COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NORFOLK COUNTY No. 2016-P-0557

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

v.

RICHARD D. O'LEARY
Appellee.

ON APPEAL FROM AN ORDER OF THE NORFOLK SUPERIOR COURT ALLOWING THE DEFENDANT'S MOTION TO DISMISS

COMMONWEALTH'S BRIEF AND RECORD APPENDIX

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MAY 2016

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ISSUE PRESENTED

The vehicle the defendant was driving rolled over five times, causing serious injuries to the defendant and his passenger; the trooper informed the defendant at the hospital that a summons would issue; and the defendant, whose license was suspended, acknowledged driving and having had "a couple of beers." Where, as appellate courts have established, it was inconceivable the defendant would not have known criminal charges would issue, did the motion judge err in allowing the defendant's motion to dismiss on the basis of violation of G.L. c. 90C, §2?

STATEMENT OF THE CASE[1]

On September 23, 2014 indictments issued out of Norfolk Superior Court charging the defendant with: operating under the influence of liquor or having a blood alcohol level of .08% or greater, negligently and causing serious bodily injury, in violation of G.L. c. 90, §24L(1); operating under the influence of liquor, in violation of G.L. c. 90, §24(1)(a)(1); negligent operation of a motor vehicle, in violation of G.L. c. 90, §24(2)(a); operating a motor vehicle with a license suspended as a habitual traffic offender, in violation of G.L. c. 90, §23; operating a motor vehicle with suspended license, in violation of

[1] References are: Transcript (Tr. [Vol.]); Record Appendix (R.); Addendum (A.).

G.L. c. 90, §23; marked lanes violation, in violation of G.L. c. 89, §4A; operating under the influence of liquor, fifth offense, in violation of G.L. c. 90, §24(1)(a)(1); operating a motor vehicle with a license suspended for operating under the influence, in violation of G.L. c. 90, §23; and operating a motor vehicle with a suspended license, subsequent offense, in violation of G.L. c. 90, §23 (R. 5, 12-20).

On October 5, 2015 the defendant filed a motion to dismiss, (R. 21-25), the Commonwealth filed a memorandum in opposition (R. 26-33), and, after an evidentiary hearing (Beverly J. Cannone, J.), the defendant filed a response (R. 34-37). On December 8, 2105 the judge allowed the defendant's motion to dismiss as to all the indictments (R. 41-47). On December 16, 2015 the Commonwealth filed a notice of appeal (R. 48).

STATEMENT OF FACTS

Massachusetts State Police Trooper Jared Gray testified at the evidentiary hearing. On April 19, 2014 around 10:30 p.m. Trooper Gray responded to the Route 3 North off-ramp to Exit 17 in Braintree to a busy accident scene involving emergency personnel, police officers, and ambulances. A Jeep Cherokee SUV

had rolled over and dislodged the highway sign to Exit 17; police had closed the off-ramp (Tr. I: 4-7).

A female, identified as Patricia Murphy, was on a backboard; she was covered with blood and glass. Several people were tending to her. A male, identified as the defendant, was bloody and covered with glass; he was being attended to by emergency personnel. Both the defendant and Murphy were visibly very injured and the Jeep was heavily damaged. Trooper Gray spoke separately to both; each claimed to be a passenger (Tr. I: 7-9, 25).

The defendant and Murphy were transported to South Shore Hospital while immobilized and strapped down on stretchers. Trooper Gray responded to South Shore Hospital to ascertain what had happened. He waited until hospital personnel said he could speak with the defendant and Murphy. Trooper Gray did not have his citation book on his person (Tr. I: 9-10, 16). He first spoke with Murphy, who was in a hospital room; she again said she was a passenger. She had an odor of alcoholic beverage, her eyes were glassy, and her speech was slurred but understandable (Tr. I: 10-13). Trooper Gray then proceeded to the defendant's room. The defendant had an odor of alcoholic beverage

on his person, slurred speech, and glassy eyes. The defendant first stated he was a passenger and then said he was the driver. He said he had "a couple of beers." Trooper Gray read the defendant the Miranda warnings.[2] The defendant again said he was driving (Tr. I: 13-15).

Trooper Gray informed the defendant that he would be receiving a summons in the mail for operating under the influence, marked lanes, and operating with a suspended or revoked license. Trooper Gray stood close to the defendant so the defendant, who was boarded and immobilized, could communicate and understand him. The defendant was responsive to questions (Tr. I: 15-17). Trooper Gray, whose shift had ended much earlier, then left the hospital (Tr. I: 17).

The State Police procedure for a summons is for the trooper to complete his investigation, write the report, print out documentation, submit it to a supervisor, and, after approval, submit the court paperwork. After the date of the incident Trooper Gray learned that the defendant's license was suspended for prior incidents of operating under the influence (Tr. I: 17-20, 24). When the report was approved on April

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

28th, Trooper Gray issued the citations for operating under the influence fifth offense, operating with a license suspended due to operating under the influence, revoked license, and marked lanes violation; some of this information Trooper Gray learned after April 19th (Tr. I: 18-20). He sent the citation to the Braintree address on the defendant's booking sheet, which was information that had been gleaned from accessing license records through the Registry of Motor Vehicles. That information contained a Quincy zip code, rather than a Braintree zip code (Tr. I: 20-22).[3]

Defense Testimony at Motion to Dismiss

Patricia Murphy testified that: she did not hear any conversation between the defendant and Trooper Gray (Tr. I: 30-31); the defendant did not hire an attorney or inquire about the vehicle (Tr. I: 34, 36); and when the defendant received a summons in the mail 5-6 weeks after the incident, he and Murphy were surprised (Tr. I: 34-36).[4]

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[3] A handwritten notation on the citation also shows a street number different than the one originally listed on the citation and the booking form (R. 38-40).

[4] Murphy testified at the time of the incident that they were best friends; by the time of the hearing they were engaged (Tr. I: 30, 40-41).

Cross-examination elicited the following. Murphy agreed they were celebrating her birthday on April 19th; that the Jeep was her vehicle, that it flipped approximately five times, and that she thought she was going to die (Tr. I: 37-38). Murphy was in shock; she required stitches and had broken ribs; the defendant was aware of her injuries (Tr. I: 39-40). Her vehicle was not returned (Tr. I: 40). Murphy knew the defendant's license was suspended (Tr. I: 41). Murphy's affidavit stated that several weeks after the accident both she and the defendant had looked for something in the mail or contact from the state police about what had happened (Tr. I: 41).[5]

Judge's Findings

The judge found that Murphy testified credibly at the hearing that she thought this was merely a car accident and that no charges would arise. The judge found that for several weeks both the defendant and

[5] When presented with the affidavit, Murphy initially agreed it was fair to say that she and the defendant waited for contact from the State Police; she then indicated that she did not understand the question whether she was waiting for a citation and summons in the mail; she then stated that she did not read the affidavit. Upon the judge's inquiry, the Commonwealth agreed to accept the representations in affidavit as to whether she and the defendant waited for contact and cease questioning (Tr. I: 42-43).

Murphy had looked for something in the mail or had waited for contact from the state police regarding what happened (R. 43). At the time of the accident, the defendant's license was suspended and he was not legally permitted to drive (R. 43).

The judge found that Trooper Gray had completed his investigation into the nature of the violation and the identity of the violator at the time he left South Shore Hospital and that "[t]here was no indication at the evidentiary hearing that further investigation was done and it does not appear that additional time was necessary to determine the nature of the violation or the identity of the violator" (R. 45).

The judge found that Trooper Gray testified credibly that the defendant and Murphy appeared to be intoxicated and seriously injured and credited that he informed the defendant he would receive a summons (R. 45). The judge noted that at the time Trooper Gray informed the defendant, the defendant was boarded and immobilized while he received treatment for his injuries and that "[t]his court is not satisfied that the defendant was put on notice through the statement of Trooper Gray that the defendant would receive a summons" (R. 46).

The judge found: the underlying accident involved serious injury only to the defendant and Murphy; the defendant and Murphy could have reasonably believed that what occurred was an accident; for several weeks after the incident both the defendant and Murphy looked for something in the mail or waited for contact from the State Police regarding what occurred. The judge concluded "nothing particularly pertinent can be determined from the defendant's post-accident behavior that would support the Commonwealth's argument" (R. 46).

The judge further noted that Trooper Gray did not hand the defendant a citation at the scene or at the hospital, that it "inexplicably" took nine days to have his report approved, that the citation was written after review of the defendant's criminal and driving history, and that due to an error in zip code, it was another month before the defendant received the summons. While acknowledging the seriousness of the charges, the judge concluded that she was compelled by case law to dismiss the indictments (R. 47).

ARGUMENT

The vehicle the defendant was driving rolled over five times, causing serious injuries to the defendant and his passenger; the trooper informed the defendant at the hospital that a summons would issue; and the defendant, whose license was suspended, acknowledged driving and having had "a couple of beers." Where, as appellate courts have established, it was inconceivable the defendant would not have known that criminal charges would issue the motion judge erred in allowing the defendant's motion to dismiss on the basis of a violation of G.L. c. 90C, §2.

Despite acknowledging the seriousness of the charges, the motion judge dismissed all the indictments because "governing caselaw compels the court to dismiss the indictments" due to non-compliance with G.L. c. 90C, §2. The judge erred as a matter of law because: at the hospital the trooper gave the defendant notice that a summons would issue; the charges involve offenses for which knowledge is a necessary element; and where the vehicle rolled over five times, resulting in serious and obvious injuries. Governing caselaw in fact compels the opposite conclusion, that where the purposes of the statue were not frustrated, dismissal was inappropriate.

Under G.L. c. 90C, §2:

> A failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except where the violator could not have been stopped or where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure. In such case the violation shall be recorded upon a citation as soon as possible after such violation and the citation shall be delivered to the violator or mailed to him at his residential or mail address or to the address appearing on his license or registration as appearing in registry of motor vehicles records.

Two purposes support the requirements for citations under G.L. c. 90C, §2. The first is to prevent manipulation and misuse by eliminating unreasonable or unnecessary delay; the second purpose is to provide prompt and definite notice to the putative violator. Commonwealth v. Pappas, 384 Mass. 428, 431 (1981). The purpose of the statute reflects the "normally fleeting and nonserious nature of most traffic infractions. . . The risk that a putative defendant will remain unaware of a transient traffic

offence and will be unprepared to defend against it unless the incident is 'called immediately to (his) attention' has little relevance when applied to more serious crimes." Id. at 430, quoting Commonwealth v. Giannino, 371 Mass. 700, 703 (1977).

Failure to comply with G.L. c. 90C, §2 is not fatal where the purposes of the statute are not frustrated. Commonwealth v. Babb, 389 Mass. 275, 283 (1983). In evaluating whether the purposes of the statute were frustrated, courts consider whether: (1) the notice provisions of the statute have been met by other means; (2) whether knowledge is an essential element of the motor vehicle crime and required to be proved at trial; and (3) whether the nature of the driving incident is so serious that the driver is deemed to be on notice. See Commonwealth v. Kenney, 55 Mass. App. Ct. 514, 519 (2002). "Each case must be decided on its own peculiar facts." Commonwealth v. Provost, 12 Mass. App. Ct. 479, 484 (1981). These factors are present here.

First, the defendant was given notice that charges would result. As credited by the motion judge, Trooper Gray informed the defendant at the hospital that a summons would issue (Tr. I: 15, R. 45). See

Commonwealth v. Correia, 83 Mass. App. Ct. 780, 785-87 (2013) (nothing to suggest defendant left in doubt whether citation would issue; trooper informed defendant that citation would be issued).

The judge erroneously discounted such notice by relying on the defendant's condition at the hospital. The defendant was responsive to Trooper Gray's questions, indicating that he was oriented to what had occurred. See Commonwealth v. Cameron, 416 Mass. 314, 316 (1993) (allowance of motion to dismiss reversed; although defendant was in a state of shock, "[i]t is not reasonable to conclude that the defendant was not aware of the seriousness of the accident"). While Murphy, who was not in the defendant's hospital room at the time of his conversation with Trooper Gray, testified that she and the defendant were surprised by the appearance of the citation, her affidavit, which was specifically accepted by the judge on this point, stated that she and the defendant looked in the mail and waited to be contacted by police. This infers an expectation that there would be official government contact regarding the traffic incident.

Second, the defendant's charges include charges which required the defendant to have knowledge of the

wrongful character of his acts. Where "knowledge of the wrongful character of the act is an essential element of the offense," a requirement of notice by citation "seems as superfluous as the necessity of issuing a citation after an arrest for a motor vehicle violation." Commonwealth v. Kenney, 55 Mass. App. Ct. at 519 n.5, quoting Commonwealth v. Giannino, 371 Mass. at 704. The defendant's indictments include charges of operating with a suspended license due to being a habitual traffic offender, operating with a suspended license, operating with a suspended license due to operating under the influence, and operating with a suspended license, subsequent offense, all in violation of G.L. c. 90, §23. In prosecutions for operating with a suspended license, the Commonwealth is required to prove beyond a reasonable doubt that the defendant was notified his license was suspended or revoked. See Commonwealth v. Deramo, 436 Mass. 40 (2002). Additionally, here the evidence showed that the defendant actually knew his license was suspended (Tr. I: 41; R. 43, 46).

Third, the defendant was on notice of impending charges due to the seriousness of the offense. The requirements of §2 are flexibly applied when the

offense is serious. See Commonwealth v. Russo, 30 Mass. App. Ct. 923, 925 (1991). The defendant's vehicle rolled over five times; Murphy thought she was going to die. The force of the crash dislodged a highway exit sign. Both the defendant and Murphy were visibly injured and transported to the hospital immobilized and on backboards. And the defendant, who had four previous operating under the influence offenses and whose license was suspended, admitted he was the driver and had "a couple of beers." It is inconceivable that he was not aware of the seriousness of this situation or that the officers would have thought they had any discretion in this matter. See Commonwealth v. Pappas, 384 Mass. at 431-32 (inconceivable defendant unaware of seriousness of situation where vehicle crossed center line of public street and struck a pedestrian; equally unlikely responding officers would regard incident as a minor accident providing unchecked discretion).

The Appeals Court and Supreme Judicial Court decisions in Commonwealth v. Cameron, 34 Mass. App. Ct. 44 (1992), rev. granted and reversed, Commonwealth v. Cameron, 416 Mass. 314 (1993) are illuminating. This Court affirmed the district court's allowance of

a defendant's motion to dismiss, finding the Commonwealth failed to justify a three-day delay in issuing a citation for driving to endanger where the defendant hit a bicyclist and ran and hid. This Court concluded, as the motion judge did here, that despite the seriousness of the accident, it was constrained to apply the statute. Commonwealth v. Cameron, 34 Mass. App. Ct. at 47-48. On further appellate review, the Supreme Judicial Court in addressing justification found "[t]he Babb case stands for the proposition that, assuming the notice and abuse prevention purposes of § 2 are met, the apparent seriousness of the accident itself may justify a refusal to dismiss a complaint when an officer failed to issue a citation seasonably." Commonwealth v. Cameron, 416 Mass. at 317.[6] Where there was an obvious, life-threatening injury, and no purpose of §2 was thwarted, and the police were not seriously deficient or negligent in their handling, there was justification for excusing the delay, "We thus disagree with an analysis of §2

[6] The Court further noted that the fact that the Legislature subsequently amended §2 without reversing the Court's interpretation of that section in Babb warranted the conclusion that the Legislature accepted that interpretation. Id. at 317 n.4.

that measures 'justification' in this case simply in terms of the inadequacy of the explanation . . . In deciding this case, we look more broadly at the purposes of §2." Id. at 317-18.

Commonwealth v. Moulton, 56 Mass. App. Ct. 682, 683-85 (2002) is also on point. In Moulton, the officer opined that the defendant, who was bleeding from the head in the driver's seat of a car that had hit a wall, was operating under the influence. The defendant was removed by emergency personnel by backboard; the officer followed her to the hospital where she admitted to having two drinks. The officer told the defendant he "still needed to check a few things out" but would mail her a citation for operating under the influence and other charges, which, after conferring with his supervisor and writing a report, he did. Id. at 683. This Court reversed the order allowing the defendant's motion to dismiss. While finding the officer's actions complied with the statute, this Court additionally noted that a complaint need not be dismissed where police were not slothful or inattentive to the statutory requirements, and the basic objectives of the statute – prevention of corrupt manipulations and prompt notice – had been

met. Id. at 684-85. The Court found no manipulation or misuse of the citation process where the officer informed the defendant that a citation would issue. And given the seriousness of the accident and the fact the defendant had to be removed from her car by backboard and taken to the hospital, "the likelihood of such a citation should have been obvious to the defendant from the time the accident occurred." And the officer's informing the defendant at the hospital that he would mail her a citation supported the inference of notice. Id. at 685. This is not a case such as Commonwealth v. Carapellucci, 429 Mass. 579, 580-82 (1999), a case where a citation was never mailed and the Court found "[t]his is not a case in which the serious injuries resulting from the traffic violation . . . put the defendant on notice of the potential charges against him and created an ineradicable record of the event.")

Further, while the motion judge found the nine day process "inexplicable," given the initially conflicting information about who was driving and the intent to seek criminal charges, it was not unreasonable for Trooper Gray to write a report and submit his citation only after that report had been

approved. Trooper Gray also testified he received additional information regarding the defendant's prior convictions after the date of the incident. And notably, when Trooper Gray left the hospital, his shift had already concluded much earlier. Cf. Commonwealth v. Correia, 83 Mass. App. Ct. at 785-87 (when off-duty officer unable to deliver copy of citation to defendant at time and place of violation, delay not fatal as long as officer acts with reasonable promptness and purposes of statute not compromised); see also Commonwealth v. Gammon, 22 Mass. App. Ct. 1, 7-8 (1986) (cautious approach by police in waiting to obtain medical records to see if defendant intoxicated not inconsistent with purpose of statute).

Further, the remainder of the delay was due to incorrect information; the mistake is not attributable to the Commonwealth, nor does it thwart the purposes of the statute. Trooper Gray sent the citation to the Braintree address from the defendant's booking sheet and police received that information by accessing license records through the Registry of Motor Vehicles. (Tr. I: 20-22). This method of notice was entirely appropriate. See G.L. c. 90C, §2 (notice

shall be mailed to the person "at his residential or mail address or to the address appearing on his license or registration as appearing in registry of motor vehicles records"). That there was incorrect information in those records surely does not thwart the purpose of the statute.

CONCLUSION

The judge's order allowing the defendant's motion to dismiss should be reversed.

Respectfully submitted,
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MASS R. APP. P. 16(K) CERTIFICATION

I, Pamela Alford, Assistant District Attorney, certify that the above-captioned brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to Mass. R. App. P. 16(a)(6), (e), (f), (h); Mass. R. App. P. 18; and Mass. R. App. P. 20.

Pamela Alford

(43)

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 14-0788

COMMONWEALTH

vs.

RICHARD O'LEARY

DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

The defendant has moved pursuant to M.G.L. c. 90C, to dismiss the indictment because police failed to give him a citation at the time and place of the violation as required by statute. The Commonwealth argues that the purpose of the statute was met therefore the case must not be dismissed.

BACKGROUND

G. L. c. 90C §2 requires that a police officer record the occurrence of automobile law violations upon a citation, filling out the citation and each copy thereof as soon as possible and as completely as possible.... A failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except [1] where the violator could not have been stopped or [2] where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or [3] where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations,

justifies the failure. In such case the violation shall be recorded upon a citation as soon as possible after such violation and the citation shall be delivered to violator or mailed to him....

FACTS

On April 19, 2014 at approximately 10:30 PM, Trooper Jared Gray (Gray) of the Massachusetts state police reported to the scene of a car rollover on Route 3N at exit 17 in Braintree. When he arrived, he observed a busy accident scene with police and emergency vehicles present. He noticed a Jeep Cherokee that had rolled over and was on its side, perpendicular to the road. It appeared that the exit sign was dislodged as a result of the accident and the off ramp was closed. When he approached the vehicle he came upon the defendant and the passenger, Patricia Murphy. Ms. Murphy was located near the passenger door of the car and was covered in blood and glass. The defendant was being tended to by emergency personnel and was also covered in blood and glass. The trooper noted that both occupants appeared to be seriously injured. When he initially spoke with Ms. Murphy she told him that she was a passenger in the vehicle. When he originally spoke with the defendant, the defendant also said that he was a passenger in the vehicle. Both occupants were placed on stretchers and taken by ambulance to South Shore Hospital. The trooper followed. At the time Gray spoke with the occupants on the roadside, he did not have his citation book on him and did not know the extent of their injuries. When he arrived at the emergency room he left his citation book in his vehicle and went to speak individually to each occupant.

Upon speaking with Ms. Murphy he noted that she appeared to be intoxicated, that her speech was slurred, but that she seemed to understand their conversation. She told the trooper

that she was a passenger in the vehicle. The trooper then went and spoke with the defendant. He made observations of an odor of alcohol coming from the defendant, that the defendant's eyes were glassy and that his speech was slurred. The defendant said that he was the driver of the vehicle after saying that he was a passenger. He also told the trooper that he had had "a couple of beers." Gray read O'Leary his Miranda rights and O'Leary repeated that he was the driver of the car. The trooper told O'Leary that he would get a summons in the mail. It was the trooper's intent to complete his investigation, file his report with his supervisor and then send the citation. After filing his report with the supervisor, Gray waited nine days for the report to be approved. Once it was approved on April 28, 2014, the citation was sent to the address that was on file with the state police. The address was a Braintree residence however the ZIP Code was a Quincy ZIP Code. The citation was mailed and not received by the defendant until five or six weeks later.

After the accident, the defendant did not hire an attorney or take steps to defend the criminal case. Ms. Murphy testified credibly at the hearing that she thought that this was merely a car accident and that there would be no charges arising from it. Ms. Murphy testified that at the time of the accident, the Jeep flipped over five times and she feared she would die. At one point she lost consciousness and appeared to be in shock. She broke several ribs and was put in the trauma unit at the hospital. For several weeks after the incident both Mr. O'Leary and Ms. Murphy looked for something in the mail or waited for some sort of contact from the state police regarding what had happened. At the time of the accident, O'Leary was on probation for operating under the influence of alcohol; subsequent offense. His license was suspended and he was not legally permitted to drive.

ANALYSIS

G.L. c. 90C, § 2, provides in pertinent part that:

> "[A]ny police officer assigned to traffic enforcement duty shall, whether or not the offense occurs within his presence, record the occurrence of automobile law violations upon a citation, filling out the citation and each copy thereof as soon as possible and as completely as possible and indicating thereon for each such violation whether the citation shall constitute a written warning and, if not, whether the violation is a criminal offense for which an application for a complaint ... shall be made .... A failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except where the violator could not have been stopped or where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure."

The statute requires that police issue citations to violators at the time and place of the subject infraction. Failure to do so constitutes a defense in any court proceeding for such a violation. However, certain statutory safety valves also exist, and it is plain that citations can be issued later when "additional time [is] reasonably necessary to determine the nature of the violation' or for other extenuating circumstances." Commonwealth v. Gammon, 22 Mass. App. Ct.1, 4 (1986), quoting from Commonwealth v. Marchand, 18 Mass. App. Ct. 932, 933 (1984). "When a copy of the citation is not given to the alleged violator at the scene of the offense, the burden shifts to the Commonwealth to demonstrate that one of the exceptions to this requirement set forth in the statute is applicable." Commonwealth v. Correia, 83 Mass. App. Ct. 780, 783 (2013). The defendant need not demonstrate prejudice.[1] See Commonwealth v. Mullins, 367 Mass. 733, 734-735 (1975).

By its terms, the statute excuses the need to deliver a copy of the citation at the time and place of the violation in three circumstances: (1) when "the violator could not have been stopped"; (2) when "additional time was reasonably necessary to determine the nature of the violation or the identity of the violator"; and (3) "where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure." The defendant was present at the scene of the accident and Gray completed his investigation into the nature of the violation and the identity of the violator by the time he left South Shore Hospital. There was no indication at the evidentiary hearing that further investigation was done and it does not appear that additional time was necessary to determine the nature of the violation or the identity of the violator.

The Commonwealth argues that the third exception to the requirements set forth in the statute is applicable to this case. Here, the Commonwealth argues that the notice provisions of the statute have been met by other means; specifically that the defendant, who was on probation for OUI 4 and operating with a revoked license for OUI, knew, based on his prior criminal cases and the fact that Gray read him Miranda warnings, that his conduct would result in criminal charges and that the seriousness of the crash put the defendant on notice that he would be facing criminal charges. Trooper Gray testified credibly that the defendant and passenger appeared to be intoxicated and seriously injured. This court credits his testimony that he informed the defendant that he would receive a summons. However, at the time the trooper told the defendant this information, the defendant was boarded and immobilized while he received treatment for his

[1] The defendant has argued specific prejudice; the court declines to address this issue.

injuries at the hospital. This court is not satisfied that the defendant was put on notice through the statement of Trooper Gray that the defendant would receive a summons. Additionally, though the defendant undoubtedly at some point during the night of the accident knew he was not legally permitted to drive, there was testimony that he drove because Ms. Kelly was intoxicated and testimony that he denied driving before admitting that he was the driver. The Commonwealth argues that in changing his story, the defendant clearly was aware that he would be charged with driving while his license was suspended for OUI. The defendant argues that the fact that he changed his mind could be because his memory was troubled or because of the stress of the accident, which would heighten the need for the citation to be presented as soon as possible and as completely as possible. The Commonwealth also asserts that the serious nature of the crash put the defendant on notice that he would be charged.

In support of its position, the Commonwealth relies upon Commonwealth v. Pappas, 384 Mass. 428 (1981) and Commonwealth v. Kenney, 55 Mass.App.Ct. 514, 515–521 (2002). Pappas is distinguished from this case in several respects. In Pappas, the delay in issuing a citation to the driver involved in a fatal accident was "reasonably necessary" where the delay was caused almost entirely by the need to clear the scene, investigate the cause of the fatal accident and determine the nature of the violations. Pappas left the scene of the accident; the condition of the victim was unknown at the time of the initial investigation and the defendant was ultimately brought to the police station and cited the same day as the accident, not weeks later. In Kenney, supra at 515–516, the defendant hit a pedestrian with her car and fled the scene; the victim was thrown forty-three feet upon impact and suffered debilitating and permanent injuries. The Appeals Court observed that, in such circumstances, the defendant could not have failed to grasp the gravity of the situation from the moment of impact, and was implicitly on notice that criminal charges were likely forthcoming. Id. at 519. Indeed, immediately after the accident the defendant hired a defense attorney and withdrew $31,000 from her bank account. Id. at 520. Having satisfied one of the two major purposes of G.L. c. 90C, § 2 (notice to defendant of potential charges), the Commonwealth's failure to issue a citation before putting the case to a grand jury some months later was excused. Id. at 519–521. Nothing comparable exists here. The underlying accident involved serious injury only to the defendant and his passenger. The defendant and Ms. Murphy could reasonably have believed that what occurred was an accident. Though for several weeks after the incident both Mr. O'Leary and Ms. Murphy looked for something in the mail or waited from some sort of contact from the State Police regarding what happened, nothing particularly pertinent can be determined from the defendant's post-accident behavior that would support the Commonwealth's argument.

The Commonwealth has not met its burden here. Compare Correia, supra (off duty police officer told violator he would issue citation, explained that he did not have his citation book with him, and delivered citation to defendant at the end of his first shift back at work).

Gray did not hand the defendant a citation at the scene or at the hospital. After writing his report, the report was passed onto his supervisor who needed to approve it. Inexplicably, that process took nine days. It was after the approval and after a review of the defendant's criminal and driving histories that the citation was written. Due to an error in the zip code, it took another month before the defendant received the summons.

Though fully cognizant of the fact that the charges here are very serious, governing caselaw compels the court to dismiss the indictments.

ORDER

For the reasons discussed above, the defendant's Motion to Dismiss is **ALLOWED.**

The indictment is dismissed.

Beverly J. Cannone
Justice of the Superior Court

DATE: December 4, 2015

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92b)
Chapter 89. Law of the Road (Refs & Annos)

M.G.L.A. 89 § 4A

§ 4A. Driving vehicles in a single lane; motorcycles, riding and passing

Currentness

When any way has been divided into lanes, the driver of a vehicle shall so drive that the vehicle shall be entirely within a single lane, and he shall not move from the lane in which he is driving until he has first ascertained if such movement can be made with safety. The operators of motorcycles shall not ride abreast of more than one other motorcycle, shall ride single file when passing, and shall not pass any other motor vehicle within the same lane, except another motorcycle.

Credits

Added by St.1952, c. 461, § 1. Amended by St.1975, c. 79; St.1986, c. 296.

M.G.L.A. 89 § 4A, MA ST 89 § 4A
Current through Chapter 106 of the 2016 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92b)
Chapter 90. Motor Vehicles and Aircraft (Refs & Annos)

M.G.L.A. 90 § 23

§ 23. Operation of motor vehicle after suspension or revocation of license; concealment of identity of motor vehicle

Effective: July 1, 2009
Currentness

Any person convicted of operating a motor vehicle after his license to operate has been suspended or revoked, or after notice of the suspension or revocation of his right to operate a motor vehicle without a license has been issued by the registrar and received by such person or by his agent or employer, and prior to the restoration of such license or right to operate or to the issuance to him of a new license to operate, and any person convicted of operating or causing or permitting any other person to operate a motor vehicle after the certificate of registration for such vehicle has been suspended or revoked and prior to the restoration of such registration or to the issuance of a new certificate of registration for such vehicle, or whoever exhibits to an officer authorized to make arrests, when requested by said officer to show his license, a license issued to another person with intent to conceal his identity, shall, except as provided by section twenty-eight of chapter two hundred and sixty-six, be punished for a first offence by a fine of not less than five hundred nor more than one thousand dollars or by imprisonment for not more than ten days, or both, and for any subsequent offence by imprisonment for not less than sixty days nor more than one year, and any person who attaches or permits to be attached to a motor vehicle or trailer a number plate assigned to another motor vehicle or trailer, or who obscures or permits to be obscured the figures on any number plate attached to any motor vehicle or trailer, or who fails to display on a motor vehicle or trailer the number plate and the register number duly issued therefor, with intent to conceal the identity of such motor vehicle or trailer, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than ten days, or both. Any person convicted of operating a motor vehicle after his license to operate has been revoked by reason of his having been found to be an habitual traffic offender, as provided in section twenty-two F, or after notice of such revocation of his right to operate a motor vehicle without a license has been issued by the registrar and received by such person or by his agent or employer, and prior to the restoration of such license or right to operate or the issuance to him of a new license to operate shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two years, or both. In no case shall a person be prosecuted for operating after suspension or revocation of a license upon a failure to pay an administrative reinstatement fee without a prior written notice from the registrar mandating payment thereof.

Notwithstanding the preceding paragraph or any other general or special law to the contrary, whoever has not been previously found responsible for or convicted of, or against whom a finding of delinquency or a finding of sufficient facts to support a conviction has not been rendered on, a complaint charging a violation of operating a motor vehicle after his license to operate has been suspended or revoked, or after notice of the suspension or revocation of his right to operate a motor vehicle without a license has been issued by the registrar and received by such person or by his agent or employer, and prior to the restoration of such license or right to operate or to the issuance to him of a new license to operate shall be punished by a fine of not more than $500. This paragraph shall not apply to any person who is charged with operating a motor vehicle after his license to operate has been suspended or revoked pursuant to a violation of paragraph (a) of subdivision (1) of section 24, or section 24D, 24E, 24G, 24L or 24N of this chapter, subsection (a) of section 8 or section 8A or 8B of chapter 90B, section 8, 9 or 11 of chapter 90F or after notice of such suspension or revocation of his right to operate a motor vehicle without a license has been issued and received by such person or by his agent or employer, and prior to the restoration of such license or right to operate or the issuance to him of a new license or right to operate because of any such violation.

Any person convicted of operating a motor vehicle after his license to operate has been suspended or revoked pursuant to a violation of paragraph (a) of subdivision (1) of section twenty-four, or pursuant to section twenty-four D, twenty-four E, twenty-four G, twenty-four L, or twenty-four N of this chapter, or pursuant to subsection (a) of section eight, or pursuant to a violation of section eight A or section eight B of chapter ninety B, or pursuant to a violation of section 8, 9 or 11 of chapter ninety F, or after notice of such suspension or revocation of his right to operate a motor vehicle without a license has been issued and received by such person or by his agent or employer, and prior to the restoration of such license or right to operate or the issuance to him of a new license to operate shall be punished by a fine of not less than one thousand nor more than ten thousand dollars and by imprisonment in a house of correction for not less than sixty days and not more than two and one-half years; provided, however, that the sentence of imprisonment imposed upon such person shall not be reduced to less than sixty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served sixty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution, or of the administrator of a county correctional institution, grant to an offender committed under this paragraph a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; or to engage in employment pursuant to a work release program. The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person charged with a violation of this paragraph. Prosecutions commenced under this paragraph shall not be placed on file or continued without a finding.

Whoever operates a motor vehicle in violation of paragraph (a) of subdivision (1) of section 24, sections 24G or 24L, subsection (a) of section 8 of chapter 90B, sections 8A or 8B of chapter 90B or section 13 ½ of chapter 265, while his license or right to operate has been suspended or revoked, or after notice of such suspension or revocation of his right to operate a motor vehicle has been issued and received by such person or by his agent or employer, and prior to the restoration of such license or right to operate or the issuance to him of a new license or right to operate, pursuant to paragraph (a) of subdivision (1) of section 24, sections 24G or 24L, subsection (a) of section 8 of chapter 90B, sections 8A or 8B of chapter 90B or section 13 ½ of chapter 265 shall be punished by a fine of not less than $2,500 nor more than $10,000 and by imprisonment in a house of correction for a mandatory period of not less than 1 year and not more than 2 ½ years, with said sentence to be served consecutively to and not concurrent with any other sentence or penalty. Such sentence shall not be suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served said 1 year of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution, or of the administrator of a county correctional institution, grant to an offender committed under this paragraph a temporary release in the custody of an officer of such institution only to obtain emergency medical or psychiatric services unavailable at said institution or to engage in employment pursuant to a work release program. Section 87 of chapter 276 shall not apply to any person charged with a violation of this paragraph. Prosecutions commenced under this paragraph shall not be placed on file or continued without a finding.

A certificate of the registrar or his authorized agent that a license or right to operate motor vehicles or a certificate of registration of a motor vehicle has not been restored or that the registrar has not issued a new license so to operate to the defendant or a new certificate of registration for a motor vehicle the registration whereof has been revoked, shall be admissible as evidence in any court of the commonwealth to prove the facts certified to therein, in any prosecution hereunder wherein such facts are material. A certificate of a clerk of court that a person's license or right to operate a motor vehicle was suspended for a specified period shall be admissible as prima facie evidence in any court of the commonwealth to prove the facts certified to therein in any prosecution commenced under this section.

Upon a conviction of operating after suspension or revocation of license or right to operate under the first paragraph, the registrar shall extend said suspension or revocation for an additional sixty days. Upon a conviction of operating after suspension or revocation of license or right to operate under the second paragraph, the registrar shall extend said suspension or revocation for an additional year.

If a person operating a motor vehicle after suspension or revocation of a license to operate or the right to operate a motor vehicle under the first or second paragraphs of this section, is found by the registrar to have operated a vehicle registered to another in violation of said suspension or revocation, the registrar shall, after hearing, revoke the certificate of registration of said motor vehicle for up to thirty days. Pursuant to said hearing, the certificate of registration and the number plates shall be immediately surrendered to the registrar.

Credits

Amended by St.1933, c. 69; St.1954, c. 74; St.1963, c. 331; St.1970, c. 186; St.1971, c. 1033, § 2; St.1982, c. 373, § 1; St.1986, c. 620, §§ 3, 4; St.1990, c. 256, §§ 2 to 4; St.1992, c. 286, § 159; St.1994, c. 25, §§ 1, 2; St.1994, c. 318, § 2; St.2005, c. 122, § 2, eff. Oct. 28, 2005; St.2006, c. 119, § 1, eff. June 21, 2006; St.2009, c. 27, § 67, eff. July 1, 2009.

M.G.L.A. 90 § 23, MA ST 90 § 23
Current through Chapter 106 of the 2016 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92b)
Chapter 90. Motor Vehicles and Aircraft (Refs & Annos)

M.G.L.A. 90 § 24

§ 24. Driving while under influence of intoxicating liquor, etc.; second and subsequent offenses; punishment; treatment programs; reckless and unauthorized driving; failure to stop after collision

Effective: March 1, 2014
Currentness

(1) (a) (1) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two and one-half years, or both such fine and imprisonment.

There shall be an assessment of $250 against a person who is convicted of, is placed on probation for, or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle while under the influence of intoxicating liquor, marijuana, narcotic drugs, depressants or stimulant substances under this section; provided, however, that but $187.50 of the amount collected under this assessment shall be deposited monthly by the court with the state treasurer for who shall deposit it into the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court *for any reason.*

There shall be an assessment of $50 against a person who is convicted, placed on probation or granted a continuance without a finding or who otherwise pleads guilty to or admits to a finding of sufficient facts for operating a motor vehicle while under the influence of intoxicating liquor or under the influence of marihuana, narcotic drugs, depressants or stimulant substances, all as defined by section 1 of chapter 94C, pursuant to this section or section 24D or 24E or subsection (a) or (b) of section 24G or section 24L. The assessment shall not be subject to waiver by the court for any reason. If a person against whom a fine is assessed is sentenced to a correctional facility and the assessment has not been paid, the court shall note the assessment on the mittimus. The monies collected pursuant to the fees established by this paragraph shall be transmitted monthly by the courts to the state treasurer who shall then deposit, invest and transfer the monies, from time to time, into the Victims of Drunk Driving Trust Fund established in section 66 of chapter 10. The monies shall then be administered, pursuant to said section 66 of said chapter 10, by the victim and witness assistance board for the purposes set forth in said section 66. Fees paid by an individual into the Victims of Drunk Driving Trust Fund pursuant to this section shall be in addition to, and not in lieu of, any other fee imposed by the court pursuant to this chapter or any other chapter. The administrative office of the trial court shall file a report detailing the amount of funds imposed and collected pursuant to this section to the house and senate committees on ways and means and to the victim and witness assistance board not later than August 15 of each calendar year.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than six hundred nor more than ten thousand dollars and by imprisonment for not less than sixty days nor more than two and one-half years; provided, however, that the sentence imposed upon such person shall not be reduced to less than thirty

days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served thirty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such thirty day sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth, or any other jurisdiction because of a like offense two times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment for not less than one hundred and eighty days nor more than two and one-half years or by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one hundred and fifty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative, to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such one hundred and fifty days sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense three times preceding the date of the commission of the offense for which he has been convicted the defendant shall be punished by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment for not less than two years nor more than two and one-half years, or by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twelve months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served twelve months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twelve months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense four or more times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment for not less than two and one-half years or by a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twenty-four months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served twenty-four months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twenty-four months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

A prosecution commenced under the provisions of this subparagraph shall not be placed on file or continued without a finding except for dispositions under section twenty-four D. No trial shall be commenced on a complaint alleging a violation of this subparagraph, nor shall any plea be accepted on such complaint, nor shall the prosecution on such complaint be transferred to another division of the district court or to a jury-of-six session, until the court receives a report from the commissioner of probation pertaining to the defendant's record, if any, of prior convictions of such violations or of assignment to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense; provided, however, that the provisions of this paragraph shall not justify the postponement of any such trial or of the acceptance of any such plea for more than five working days after the date of the defendant's arraignment. The commissioner of probation shall give priority to requests for such records.

At any time before the commencement of a trial or acceptance of a plea on a complaint alleging a violation of this subparagraph, the prosecutor may apply for the issuance of a new complaint pursuant to section thirty-five A of chapter two hundred and eighteen alleging a violation of this subparagraph and one or more prior like violations. If such application is made, upon motion of the prosecutor, the court shall stay further proceedings on the original complaint pending the determination of the application for the new complaint. If a new complaint is issued, the court shall dismiss the original complaint and order that further proceedings on the new complaint be postponed until the defendant has had sufficient time to prepare a defense.

If a defendant waives right to a jury trial pursuant to section twenty-six A of chapter two hundred and eighteen on a complaint under this subdivision he shall be deemed to have waived his right to a jury trial on all elements of said complaint.

(2) Except as provided in subparagraph (4) the provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person charged with a violation of subparagraph (1) and if said person has been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the commission of the offense with which he is charged.

(3) Notwithstanding the provisions of section six A of chapter two hundred and seventy-nine, the court may order that a defendant convicted of a violation of subparagraph (1) be imprisoned only on designated weekends, evenings or holidays; provided, however, that the provisions of this subparagraph shall apply only to a defendant who has not been convicted

previously of such violation or assigned to an alcohol or controlled substance education, treatment or rehabilitation program preceding the date of the commission of the offense for which he has been convicted.

(4) Notwithstanding the provisions of subparagraphs (1) and (2), a judge, before imposing a sentence on a defendant who pleads guilty to or is found guilty of a violation of subparagraph (1) and who has not been convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense two or more times of the date of the commission of the offense for which he has been convicted, shall receive a report from the probation department of a copy of the defendant's driving record, the criminal record of the defendant, if any, and such information as may be available as to the defendant's use of alcohol and may, upon a written finding that appropriate and adequate treatment is available to the defendant and the defendant would benefit from such treatment and that the safety of the public would not be endangered, with the defendant's consent place a defendant on probation for two years; provided, however, that a condition for such probation shall be that the defendant be confined for no less than fourteen days in a residential alcohol treatment program and to participate in an out patient counseling program designed for such offenders as provided or sanctioned by the division of alcoholism, pursuant to regulations to be promulgated by said division in consultation with the department of correction and with the approval of the secretary of health and human services or at any other facility so sanctioned or regulated as may be established by the commonwealth or any political subdivision thereof for the purpose of alcohol or drug treatment or rehabilitation, and comply with all conditions of said residential alcohol treatment program. Such condition of probation shall specify a date before which such residential alcohol treatment program shall be attended and completed.

Failure of the defendant to comply with said conditions and any other terms of probation as imposed under this section shall be reported forthwith to the court and proceedings under the provisions of section three of chapter two hundred and seventy-nine shall be commenced. In such proceedings, such defendant shall be taken before the court and if the court finds that he has failed to attend or complete the residential alcohol treatment program before the date specified in the conditions of probation, the court shall forthwith specify a second date before which such defendant shall attend or complete such program, and unless such defendant shows extraordinary and compelling reasons for such failure, shall forthwith sentence him to imprisonment for not less than two days; provided, however, that such sentence shall not be reduced to less than two days, nor suspended, nor shall such person be eligible for furlough or receive any reduction from his sentence for good conduct until such person has served two days of such sentence; and provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or of the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; or to engage in employment pursuant to a work release program. If such defendant fails to attend or complete the residential alcohol treatment program before the second date specified by the court, further proceedings pursuant to said section three of said chapter two hundred and seventy-nine shall be commenced, and the court shall forthwith sentence the defendant to imprisonment for not less than thirty days as provided in subparagraph (1) for such a defendant.

The defendant shall pay for the cost of the services provided by the residential alcohol treatment program; provided, however, that no person shall be excluded from said programs for inability to pay; and provided, further, that such person files with the court, an affidavit of indigency or inability to pay and that investigation by the probation officer confirms such indigency or establishes that payment of such fee would cause a grave and serious hardship to such individual or to the family of such individual, and that the court enters a written finding thereof. In lieu of waiver of the entire amount of said fee, the court may direct such individual to make partial or installment payments of the cost of said program.

(b) A conviction of a violation of subparagraph (1) of paragraph (a) shall revoke the license or right to operate of the person so convicted unless such person has not been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the

date of the commission of the offense for which he has been convicted, and said person qualifies for disposition under section twenty-four D and has consented to probation as provided for in said section twenty-four D; provided, however, that no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or the right to operate. Such revoked license shall immediately be surrendered to the prosecuting officer who shall forward the same to the registrar. The court shall report immediately any revocation, under this section, of a license or right to operate to the registrar and to the police department of the municipality in which the defendant is domiciled. Notwithstanding the provisions of section twenty-two, the revocation, reinstatement or issuance of a license or right to operate by reason of a violation of paragraph (a) shall be controlled by the provisions of this section and sections twenty-four D and twenty-four E.

(c) (1) Where the license or right to operate has been revoked under section twenty-four D or twenty-four E, or revoked under paragraph (b) and such person has not been convicted of a like offense or has not been assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the date of the commission of the offense for which he has been convicted, the registrar shall not restore the license or reinstate the right to operate to such person unless the prosecution of such person has been terminated in favor of the defendant, until one year after the date of conviction; provided, however, that such person may, after the expiration of three months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or educational purposes, which license shall be effective for not more than an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control, and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of six months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary.

(2) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which such person has been convicted, the registrar shall not restore the license or reinstate the right to operate of such person unless the prosecution of such person has been terminated in favor of the defendant, until two years after the date of the conviction; provided, however, that such person may, after the expiration of 1 year from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes, which license shall be effective for not more than an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and that such person shall have successfully completed the residential treatment program in subparagraph (4) of paragraph (a) of subdivision (1), or such treatment program mandated by section twenty-four D, and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of 18 months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(3) Where the license or right to operate of any person has been revoked under paragraph (b) and such person has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like

offense by a court of the commonwealth or any other jurisdiction two times preceding the date of the commission of the crime for which he has been convicted or where the license or right to operate has been revoked pursuant to section twenty-three due to a violation of said section due to a prior revocation under paragraph (b) or under section twenty-four D or twenty-four E, the registrar shall not restore the license or reinstate the right to operate to such person, unless the prosecution of such person has terminated in favor of the defendant, until eight years after the date of conviction; provided however, that such person may, after the expiration of two years from the date of the conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes, which license shall be effective for not more than an identical twelve hour period every day, on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of four years from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(3 ½) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation three times preceding the date of the commission of the offense for which such person has been convicted, the registrar shall not restore the license or reinstate the right to operate of such person unless the prosecution of such person has been terminated in favor of the defendant, until ten years after the date of the conviction; provided, however, that such person may, after the expiration of five years from the date of the conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes which license shall be effective for an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of eight years from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under the terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(3 ¾) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation four or more times preceding the date of the commission of the offense for which such person has been convicted, such person's license or right to operate a motor vehicle shall be revoked for the life of such person, and such person shall not be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship; provided, however, that such license shall be restored or such right to operate shall be reinstated if the prosecution of such person has been terminated in favor of such person. An aggrieved party may appeal, in accordance with the provisions of chapter thirty A, from any order of the registrar of motor vehicles under the provisions of this section.

(4) In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of corrections, the department of correction, or the registry, shall be prima facie evidence that the defendant before the court had been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior convictions described therein. The commonwealth shall not be required to introduce any additional corrobating [1] evidence, nor live witness testimony to establish the validity of such prior convictions.

(d) For the purposes of subdivision (1) of this section, a person shall be deemed to have been convicted if he pleaded guilty or nolo contendere or admits to a finding of sufficient facts or was found or adjudged guilty by a court of competent jurisdiction, whether or not he was placed on probation without sentence or under a suspended sentence or the case was placed on file, and a license may be revoked under paragraph (b) hereof notwithstanding the pendency of a prosecution upon appeal or otherwise after such a conviction. Where there has been more than one conviction in the same prosecution, the date of the first conviction shall be deemed to be the date of conviction under paragraph (c) hereof.

(e) In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to him upon his request and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him; and provided, further, that blood shall not be withdrawn from any party for the purpose of such test or analysis except by a physician, registered nurse or certified medical technician. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f) or in any proceedings provided for in section twenty-four N. If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed him under arrest shall not be liable for false arrest if such police officer had reasonable grounds to believe that the person arrested had been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor; provided, however, that in an instance where a defendant is under the age of twenty-one and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater, the officer who placed him under arrest shall, in accordance with subparagraph (2) of paragraph (f), suspend such defendant's license or permit and take all other actions directed therein, if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference. A certificate, signed and sworn to, by a chemist of the department of the state police or by a chemist of a laboratory certified by the department of public health, which contains the results of an analysis made by such chemist of the percentage of alcohol in such blood shall be prima facie evidence of the percentage of alcohol in such blood.

(f) (1) Whoever operates a motor vehicle upon any way or in any place to which the public has right to access, or upon any way or in any place to which the public has access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor; provided, however, that no such person shall be deemed to have consented to a blood test unless such person has been brought for treatment to a medical facility licensed under the provisions of section 51 of chapter 111; and provided, further, that no person who is afflicted with hemophilia, diabetes or any other condition requiring the use

of anticoagulants shall be deemed to have consented to a withdrawal of blood. Such test shall be administered at the direction of a police officer, as defined in section 1 of chapter 90C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of at least 180 days and up to a lifetime loss, for such refusal, no such test or analysis shall be made and he shall have his license or right to operate suspended in accordance with this paragraph for a period of 180 days; provided, however, that any person who is under the age of 21 years or who has been previously convicted of a violation under this section, subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, section 24L or subsection (a) of section 8 of chapter 90B, section 8A or 8B of said chapter 90B, or section 13 ½ of chapter 265 or a like violation by a court of any other jurisdiction or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction for a like offense shall have his license or right to operate suspended forthwith for a period of 3 years for such refusal; provided, further, that any person previously convicted of, or assigned to a program for, 2 such violations shall have the person's license or right to operate suspended forthwith for a period of 5 years for such refusal; and provided, further, that a person previously convicted of, or assigned to a program for, 3 or more such violations shall have the person's license or right to operate suspended forthwith for life based upon such refusal. If a person refuses to submit to any such test or analysis after having been convicted of a violation of section 24L, the registrar[2] shall suspend his license or right to operate for 10 years. If a person refuses to submit to any such test or analysis after having been convicted of a violation of subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, or section 13 ½ of chapter 265, the registrar shall revoke his license or right to operate for life. If a person refuses to take a test under this paragraph, the police officer shall:

(i) immediately, on behalf of the registrar, take custody of such person's license or right to operate issued by the commonwealth;

(ii) provide to each person who refuses such test, on behalf of the registrar, a written notification of suspension in a format approved by the registrar; and

(iii) impound the vehicle being driven by the operator and arrange for the vehicle to be impounded for a period of 12 hours after the operator's refusal, with the costs for the towing, storage and maintenance of the vehicle to be borne by the operator.

The police officer before whom such refusal was made shall, within 24 hours, prepare a report of such refusal. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer before whom such refusal was made. Each report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to a chemical test or analysis when requested by the officer to do so, such refusal having been witnessed by another person other than the defendant. Each report shall identify the police officer who requested the chemical test or analysis and the other person witnessing the refusal. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate which has been confiscated pursuant to this subparagraph shall be forwarded to the registrar forthwith. The report shall constitute prima facie evidence of the facts set forth therein at any administrative hearing regarding the suspension specified in this section.

The suspension of a license or right to operate shall become effective immediately upon receipt of the notification of suspension from the police officer. A suspension for a refusal of either a chemical test or analysis of breath or blood shall run consecutively and not concurrently, both as to any additional suspension periods arising from the same incident, and as to each other.

No license or right to operate shall be restored under any circumstances and no restricted or hardship permits shall be issued during the suspension period imposed by this paragraph; provided, however, that the defendant may immediately, upon the entry of a not guilty finding or dismissal of all charges under this section, section 24G, section 24L, or section 13 ½ of chapter 265, and in the absence of any other alcohol related charges pending against said defendant, apply for and be immediately granted a hearing before the court which took final action on the charges for the purpose of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely endanger the public safety. In all such instances, the court shall issue written findings of fact with its decision.

(2) If a person's blood alcohol percentage is not less than eight one-hundredths or the person is under twenty-one years of age and his blood alcohol percentage is not less than two one-hundredths, such police officer shall do the following:

(i) immediately and on behalf of the registrar take custody of such person's drivers license or permit issued by the commonwealth;

(ii) provide to each person who refuses the test, on behalf of the registrar, a written notification of suspension, in a format approved by the registrar; and

(iii) immediately report action taken under this paragraph to the registrar. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer. Each report shall set forth the grounds for the officer's belief that the person arrested has been operating a motor vehicle on any way or place while under the influence of intoxicating liquor and that the person's blood alcohol percentage was not less than .08 or that the person was under 21 years of age at the time of the arrest and whose blood alcohol percentage was not less than .02. The report shall indicate that the person was administered a test or analysis, that the operator administering the test or analysis was trained and certified in the administration of the test or analysis, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for the test was regularly serviced and maintained and that the person administering the test had every reason to believe the equipment was functioning properly at the time the test was administered. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend, in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate confiscated under this clause shall be forwarded to the registrar forthwith.

The license suspension shall become effective immediately upon receipt by the offender of the notice of intent to suspend from a police officer. The license to operate a motor vehicle shall remain suspended until the disposition of the offense for which the person is being prosecuted, but in no event shall such suspension pursuant to this subparagraph exceed 30 days.

In any instance where a defendant is under the age of twenty-one years and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater and upon the failure of any police officer pursuant to this subparagraph, to suspend or take custody of the driver's license or permit issued by the commonwealth, and, in the absence of a complaint alleging a violation of paragraph (a) of subdivision (1) or a violation of section twenty-four G or twenty-four L, the registrar shall administratively suspend the defendant's license or right to operate a motor vehicle upon receipt of a report from the police officer who administered such chemical test or analysis of the defendant's blood pursuant to subparagraph (1). Each such report shall be made on a form approved by the registrar and shall be sworn to under the penalties of perjury by such police officer. Each such report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor and that such person was under twenty-one years of age at the time of the arrest and whose blood alcohol percentage was two one-hundredths or greater. Such report shall also state that the person was administered such a test or analysis, that the operator administering the test or analysis was trained

and certified in the administration of such test, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for such test was regularly serviced and maintained, and that the person administering the test had every reason to believe that the equipment was functioning properly at the time the test was administered. Each such report shall be endorsed by the police chief as defined in section one of chapter ninety C, or by the person authorized by him, and shall be sent to the registrar along with the confiscated license or permit not later than ten days from the date that such chemical test or analysis of the defendant's blood was administered. The license to operate a motor vehicle shall thereupon be suspended in accordance with section twenty-four P.

(g) Any person whose license, permit or right to operate has been suspended under subparagraph (1) of paragraph (f) shall, within fifteen days of suspension, be entitled to a hearing before the registrar which shall be limited to the following issues: (i) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which members of the public have a right of access or upon any way to which members of the public have a right of access as invitees or licensees, (ii) was such person placed under arrest, and (iii) did such person refuse to submit to such test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall forthwith reinstate such license, permit or right to operate. The registrar shall create and preserve a record at said hearing for judicial review. Within thirty days of the issuance of the final determination by the registrar following a hearing under this paragraph, a person aggrieved by the determination shall have the right to file a petition in the district court for the judicial district in which the offense occurred for judicial review. The filing of a petition for judicial review shall not stay the revocation or suspension. The filing of a petition for judicial review shall be had as soon as possible following the submission of said request, but not later than thirty days following the submission thereof. Review by the court shall be on the record established at the hearing before the registrar. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the registrar's determination.

Any person whose license or right to operate has been suspended pursuant to subparagraph (2) of paragraph (f) on the basis of chemical analysis of his breath may within ten days of such suspension request a hearing and upon such request shall be entitled to a hearing before the court in which the underlying charges are pending or if the individual is under the age of twenty-one and there are no pending charges, in the district court having jurisdiction where the arrest occurred, which hearing shall be limited to the following issue; whether a blood test administered pursuant to paragraph (e) within a reasonable period of time after such chemical analysis of his breath, shows that the percentage, by weight, of alcohol in such person's blood was less than eight one-hundredths or, relative to such person under the age of twenty-one was less than two one-hundredths. If the court finds that such a blood test shows that such percentage was less than eight one-hundredths or, relative to such person under the age of twenty-one, that such percentage was less than two one-hundredths, the court shall restore such person's license, permit or right to operate and shall direct the prosecuting officer to forthwith notify the department of criminal justice information services and the registrar of such restoration.

(h) Any person convicted of a violation of subparagraph (1) of paragraph (a) that involves operating a motor vehicle while under the influence of marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, may, as part of the disposition in the case, be ordered to participate in a driver education program or a drug treatment or drug rehabilitation program, or any combination of said programs. The court shall set such financial and other terms for the participation of the defendant as it deems appropriate.

(2) (a) Whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees, operates a motor vehicle recklessly, or operates such a vehicle negligently so that the lives or safety of the public might be endangered, or upon a bet or wager or in a race, or whoever operates a motor vehicle for the purpose of making a record and thereby violates any provision of section seventeen or any regulation under section eighteen, or whoever without stopping and making known his name, residence and the register number of his motor

vehicle goes away after knowingly colliding with or otherwise causing injury to any other vehicle or property, or whoever loans or knowingly permits his license or learner's permit to operate motor vehicles to be used by any person, or whoever makes false statements in an application for such a license or learner's permit, or whoever knowingly makes any false statement in an application for registration of a motor vehicle or whoever while operating a motor vehicle in violation of section 8M, 12A or 13B, such violation proved beyond a reasonable doubt, is the proximate cause of injury to any other person, vehicle or property by operating said motor vehicle negligently so that the lives or safety of the public might be endangered, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars or by imprisonment for not less than two weeks nor more than two years, or both; and whoever uses a motor vehicle without authority knowing that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, or both, and for a second offense by imprisonment in the state prison for not more than five years or in a house of correction for not less than thirty days nor more than two and one half years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment; and whoever is found guilty of a third or subsequent offense of such use without authority committed within five years of the earliest of his two most recent prior offenses shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars or by imprisonment for not less than six months nor more than two and one half years in a house of correction or for not less than two and one half years nor more than five years in the state prison or by both fine and imprisonment. A summons may be issued instead of a warrant for arrest upon a complaint for a violation of any provision of this paragraph if in the judgment of the court or justice receiving the complaint there is reason to believe that the defendant will appear upon a summons.

There shall be an assessment of $250 against a person who, by a court of the commonwealth, is convicted of, is placed on probation for or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle negligently so that the lives or safety of the public might be endangered under this section, but $250 of the $250 collected under this assessment shall be deposited monthly by the court with the state treasurer, who shall deposit it in the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

(a ½) (1) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public shall have access as invitees or licensees, and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away after knowingly colliding with or otherwise causing injury to any person not resulting in the death of any person, shall be punished by imprisonment for not less than six months nor more than two years and by a fine of not less than five hundred dollars nor more than one thousand dollars.

(2) Whoever operates a motor vehicle upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public shall have access as invitees or licensees and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away to avoid prosecution or evade apprehension after knowingly colliding with or otherwise causing injury to any person shall, if the injuries result in the death of a person, be punished by imprisonment in the state prison for not less than two and one-half years nor more than ten years and by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years and by a fine of not less than one thousand dollars nor more than five thousand dollars. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this paragraph be eligible for probation, parole, or furlough or receive any deduction from his sentence until such person has served at least one year of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this paragraph, a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution or to engage in employment pursuant to a work release program.

(3) Prosecutions commenced under subparagraph (1) or (2) shall not be continued without a finding nor placed on file.

(b) A conviction of a violation of paragraph (a) or paragraph (a ½) of subdivision (2) of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event, and shall unless the court or magistrate recommends otherwise, revoke immediately the license or right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle or has exclusive control of any motor vehicle as a manufacturer or dealer or otherwise, the registrar may revoke the certificate of registration of any or all motor vehicles so owned or exclusively controlled.

(c) The registrar, after having revoked the license or right to operate of any person under paragraph (b), in his discretion may issue a new license or reinstate the right to operate to him, if the prosecution has terminated in favor of the defendant. In addition, the registrar may, after an investigation or upon hearing, issue a new license or reinstate the right to operate to a person convicted in any court for a violation of any provision of paragraph (a) or (a ½) of subdivision (2); provided, however, that no new license or right to operate shall be issued by the registrar to: (i) any person convicted of a violation of subparagraph (1) of paragraph (a ½) until one year after the date of revocation following his conviction if for a first offense, or until two years after the date of revocation following any subsequent conviction; (ii) any person convicted of a violation of subparagraph (2) of paragraph (a ½) until three years after the date of revocation following his conviction if for a first offense or until ten years after the date of revocation following any subsequent conviction; (iii) any person convicted, under paragraph (a) of using a motor vehicle knowing that such use is unauthorized, until one year after the date of revocation following his conviction if for a first offense or until three years after the date of revocation following any subsequent conviction; and (iv) any person convicted of any other provision of paragraph (a) until sixty days after the date of his original conviction if for a first offense or one year after the date of revocation following any subsequent conviction within a period of three years. Notwithstanding the forgoing, a person holding a junior operator's license who is convicted of operating a motor vehicle recklessly or negligently under paragraph (a) shall not be eligible for license reinstatement until 180 days after the date of his original conviction for a first offense or 1 year after the date of revocation following a subsequent conviction within a period of 3 years. The registrar, after investigation, may at any time rescind the revocation of a license or right to operate revoked because of a conviction of operating a motor vehicle upon any way or in any place to which the public has a right of access or any place to which members of the public have access as invitees or licensees negligently so that the lives or safety of the public might be endangered. The provisions of this paragraph shall apply in the same manner to juveniles adjudicated under the provisions of section fifty-eight B of chapter one hundred and nineteen.

(3) The prosecution of any person for the violation of any provision of this section, if a subsequent offence, shall not, unless the interests of justice require such disposition, be placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceedings; and such a prosecution shall be otherwise disposed of only on motion in writing stating specifically the reasons therefor and verified by affidavits if facts are relied upon. If the court or magistrate certifies in writing that he is satisfied that the reasons relied upon are sufficient and that the interests of justice require the allowance of the motion, the motion shall be allowed and the certificate shall be filed in the case. A copy of the motion and certificate shall be sent by the court or magistrate forthwith to the registrar.

(4) In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or prior finding of sufficient facts by either original court papers or certified attested copy of original court papers, accompanied by a certified attested copy of the biographical and informational data from official probation office records, shall be prima facie evidence that a defendant has been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense by a court of the commonwealth one or more times preceding the date of commission of the offense for which said defendant is being prosecuted.

Credits

Amended by St.1932, c. 26, § 1; St.1935, c. 360; St.1936, c. 182, §§ 1, 2; St.1936, c. 434, § 1; St.1937, c. 117; St.1937, c. 230, § 1; St.1938, c. 145; St.1939, c. 82; St.1955, c. 198, §§ 1 to 3; St.1961, c. 340; St.1961, c. 347; St.1961, c. 422, § 2; St.1962, c. 394, § 2; St.1963, c. 369, § 2; St.1964, c. 200, §§ 1 to 5; St.1966, c. 191, § 1; St.1966, c. 316; St.1967, c. 773; St.1968, c. 259; St.1969, c. 7; St.1969, c. 163; St.1969, c. 202; St.1970, c. 253; St.1971, c. 1007, § 1; St.1971, c. 1071, § 4; St.1972, c. 111; St.1972, c. 376; St.1972, c. 488, §§ 1, 2; St.1973, c. 227; St.1973, c. 243; St.1974, c. 206, § 2; St.1974, c. 418; St.1974, c. 425; St.1974, c. 647, § 2; St.1975, c. 156, § 1; St.1980, c. 383, §§ 1, 2; St.1982, c. 373, §§ 2 to 5; St.1984, c. 189, § 65; St.1986, c. 620, §§ 5 to 13; St.1986, c. 677, § 1; St.1991, c. 138, § 287; St.1991, c. 460, §§ 1 to 4; St.1992, c. 133, §§ 447, 587; St.1992, c. 379, §§ 1B, 1C; St.1993, c. 12, § 1; St.1994, c. 25, §§ 3 to 6; St.1994, c. 60, §§ 101 to 109; St.1995, c. 38, §§ 110 to 116; St.1996, c. 151, § 236; St.1996, c. 450, §§ 137, 138; St.1997, c. 43, §§ 79, 80; St.1998, c. 161, § 317; St.1999, c. 127, §§ 108, 109; St.2002, c. 52, § 2; St.2002, c. 302, §§ 1 to 4; St.2003, c. 26, §§ 228, 229, eff. July 1, 2003; St.2003, c. 28, §§1 to 7, eff. June 30, 2003; St.2005, c. 122, §§ 3 to 5, 6A and 9 to 12, eff. Oct. 28, 2005; St.2005, c. 122, §§ 6, 7 and 8, eff. Jan. 1, 2006; St.2006, c. 428, § 13, eff. Jan. 3, 2007; St.2008, c. 182, § 45, eff. July 1, 2008; St.2008, c. 302, §§ 14, 15, eff. July 1, 2008; St.2010, c. 155, § 11, eff. Sept. 30, 2010; St.2010, c. 256, § 63, eff. Nov. 4, 2010; St.2012, c. 139, § 97, eff. Jan. 1, 2013; St.2012, c. 139, §§ 98 to 100, eff. July 1, 2012; St.2013, c. 38, § 80, eff. Mar. 1, 2014.

Footnotes

1 So in enrolled bill; probably should read "corroborating".

2 So in enrolled bill; probably should read "registrar".

M.G.L.A. 90 § 24, MA ST 90 § 24

Current through Chapter 106 of the 2016 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92b)
Chapter 90. Motor Vehicles and Aircraft (Refs & Annos)

M.G.L.A. 90 § 24L

§ 24L. Serious bodily injury by motor vehicle while under influence of intoxicating substance; penalties

Effective: June 30, 2003
Currentness

(1) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or marihuana, narcotic drugs, depressants, or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, and so operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered, and by any such operation so described causes serious bodily injury, shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than ten years and by a fine of not more than five thousand dollars, or by imprisonment in a jail or house of correction for not less than six months nor more than two and one-half years and by a fine of not more than five thousand dollars.

The sentence imposed upon such person shall not be reduced to less than six months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, or furlough or receive any deduction from his sentence until such person has served at least six months of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or of the administrator of a county correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; or to engage in employment pursuant to a work release program. Prosecutions commenced under this subdivision shall neither be continued without a finding nor placed on file.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person charged with a violation of this subdivision.

(2) Whoever, upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or vapors of glue, and by any such operation causes serious bodily injury, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years, or by a fine of not less than three thousand dollars, or both.

(3) For the purposes of this section "serious bodily injury" shall mean bodily injury which creates a substantial risk of death or which involves either total disability or the loss or substantial impairment of some bodily function for a substantial period of time.

(4) The registrar shall revoke the license or right to operate of a person convicted of a violation of subdivision (1) or (2) for a period of two years after the date of conviction. No appeal, motion for new trial or exception shall operate to stay the revocation

of the license or the right to operate; provided, however, such license shall be restored or such right to operate shall be reinstated if the prosecution of such person ultimately terminates in favor of the defendant.

Credits

Added by St.1986, c. 620, § 17. Amended by St.2003, c. 28, §§ 24, 25.

M.G.L.A. 90 § 24L, MA ST 90 § 24L
Current through Chapter 106 of the 2016 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92b)
Chapter 90C. Procedure for Motor Vehicle Offenses (Refs & Annos)

M.G.L.A. 90C § 2

§ 2. Citations and citation books

Effective: October 26, 2010
Currentness

Each police chief shall issue citation books to each permanent full-time police officer of his department whose duties may or will include traffic duty or traffic law enforcement, or directing or controlling traffic, and to such other officers as he at his discretion may determine. Each police chief shall obtain a receipt on a form approved by the registrar from such officer to whom a citation book has been issued. Each police chief shall also maintain citation books at police headquarters for the recording of automobile law violations by police officers to whom citation books have not been issued.

Each police chief appointed by the trustees of the commonwealth's state universities and community colleges under section 22 of chapter 15A shall certify to the registrar, on or before January first of each year, that:

(a) the police officers appointed by the trustees at the state university or community college have been issued a current first aid/CPR certificate;

(b)(i)(A) 51 per cent of such police officers have completed either the basic full-time recruit academy operated or certified by the municipal police training committee or the campus police academy operated by the Massachusetts state police, or

(B) 51 per cent of the police officers have completed a basic reserve/intermittent police officer training course approved by the municipal police training committee and have had at least 5 years experience issuing citations pursuant to this chapter; and

(ii) the remaining 49 per cent of police officers have completed a minimum of a basic reserve/intermittent police officer training course approved by the municipal police training committee;

(c) such officers have completed annual in-service training of no less than 40 hours;

(d) such officers meet the same firearms qualification standards as set from time to time by the municipal police training committee if such officers have been authorized by the board of trustees of the state university or community college to carry firearms;

(e) the state university or community college police department submits uniform crime reports to the FBI;

(f) a memorandum of understanding has been entered into with the police chief of the municipality wherein the state university or community college is located outlining the policies and procedures for utilizing the municipality's booking and lock-up facilities, fingerprinting and breathalyzer equipment if the state university or community college police department does not provide booking and lock-up facilities, fingerprinting or breathalyzer equipment; and

(g) the state university or community college police department has policies and procedures in place for use of force, pursuit, arrest, search and seizure, racial profiling and motor vehicle law enforcement.

Notwithstanding the previous paragraph, nothing in this section shall limit the authority granted to the police chiefs and police officers at the state universities and community colleges under said section 22 of said chapter 15A or section 18 of chapter 73.

Notwithstanding the provisions of any general or special law, other than a provision of this chapter, to the contrary, any police officer assigned to traffic enforcement duty shall, whether or not the offense occurs within his presence, record the occurrence of automobile law violations upon a citation, filling out the citation and each copy thereof as soon as possible and as completely as possible and indicating thereon for each such violation whether the citation shall constitute a written warning and, if not, whether the violation is a criminal offense for which an application for a complaint as provided by subsection B of section three shall be made, whether the violation is a civil motor vehicle infraction which may be disposed of in accordance with subsection (A) of said section three, or whether the violator has been arrested in accordance with section twenty-one of chapter ninety. Said police officer shall inform the violator of the violation and shall give a copy of the citation to the violator. Such citation shall be signed by said police officer and by the violator, and whenever a citation is given to the violator in person that fact shall be so certified by the police officer. The violator shall be requested to sign the citation in order to acknowledge that is [1] has been received. If a written warning is indicated, no further action need be taken by the violator. No other form of notice, except as provided in this section, need be given to the violator.

A failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except where the violator could not have been stopped or where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure. In such case the violation shall be recorded upon a citation as soon as possible after such violation and the citation shall be delivered to the violator or mailed to him at his residential or mail address or to the address appearing on his license or registration as appearing in registry of motor vehicles records. The provisions of the first sentence of this paragraph shall not apply to any complaint or indictment charging a violation of section twenty-four, twenty-four G or twenty-four L of chapter ninety, providing such complaint or indictment relates to a violation of automobile law which resulted in one or more deaths.

At or before the completion of his tour of duty, a police officer to whom a citation book has been issued and who has recorded the occurrence of an automobile law violation upon a citation shall deliver to his police chief or to the person duly authorized by said chief all remaining copies of such citation, duly signed, except the police officer's copy which shall be retained by him. If the police officer has directed that a written warning be issued, the part of the citation designated as the registry of motor vehicles record shall be forwarded forthwith by the police chief or person authorized by him to the registrar and shall be kept by the registrar in his main office.

If the police officer has not directed that a written warning be issued and has not arrested the violator, the police chief or a person duly authorized by him shall retain the police department copy of each citation, and not later than the end of the sixth business day after the date of the violation:

(a) in the case of citations alleging only one or more civil motor vehicle infractions, shall cause all remaining copies of such citations to be mailed or delivered to the registrar; or

(b) in the case of citations alleging one or more criminal automobile law violations, shall cause all remaining copies of such citations to be delivered to the clerk-magistrate of the district court for the judicial district where the violation occurred. Failure to comply with the provisions of this paragraph shall not constitute a defense to any complaint or indictment charging a violation of section twenty-four, twenty-four G or twenty-four L of chapter ninety if such violation resulted in one or more deaths. Each clerk-magistrate shall maintain a record in the form prescribed by the chief justice of the district court department of such citations and shall notify the registrar of the disposition of such citations in accordance with the provisions of section twenty-seven of said chapter ninety.

If a citation is spoiled, mutilated or voided, it shall be endorsed with a full explanation thereof by the police officer voiding such citation, and shall be returned to the registrar forthwith and shall be duly accounted for upon the audit sheet for the citation book from which said citation was removed.

Credits

Added by St.1982, c. 586, § 2. Amended by St.1984, c. 97, § 3; St.1985, c. 794, § 3; St.1986, c. 620, §§ 18, 19; St.1991, c. 138, § 160; St.1992, c. 379, § 4; St.2001, c. 67; St.2003, c. 46, § 99, eff. July 31, 2003; St.2006, c. 134, § 3A, eff. Sept. 28, 2006; St.2010, c. 189, §§ 75, 76, eff. Oct. 26, 2010.

Footnotes

1 So in enrolled bill; probably should read "it".

M.G.L.A. 90C § 2, MA ST 90C § 2

Current through Chapter 106 of the 2016 2nd Annual Session

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RECORD APPENDIX[1]
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[1] Record Appendix pages 33, 38-40 have been redacted pursuant to the Interim Guidelines for the Protection of Personal Identifying Data in Publicly Accessible Court Documents.

1482CR00788 Commonwealth vs. O'Leary, Richard D

Case Type Indictment
Status Date: 05/20/2016
Case Judge:
Next Event: 09/21/2016

Case Status Open
File Date 09/23/2014
DCM Track: B - Complex

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Party Information

Commonwealth - Prosecutor

Alias

Attorney/Bar Code	Phone Number
Kukafka, Esq., Varsha (631379)	
Thaler, Esq., Michael P. (680284)	

More Party Information

O'Leary, Richard D - Defendant

Alias

Attorney/Bar Code	Phone Number
Babcock, Esq., Douglas Thomas (667992)	

More Party Information

Party Charge Information

O'Leary, Richard D - Defendant

Charge # 1 : **90/24L/B-2 - Felony** OUI-DRUGS & SERIOUS INJURY & NEGLIGENT c90 §24L(1)

Original Charge 90/24L/B-2 OUI-DRUGS & SERIOUS INJURY & NEGLIGENT c90 §24L(1) (Felony)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

O'Leary, Richard D - Defendant

Charge # 2 : **90/24/J-6 - Misdemeanor - more than 100 days incarceration** OUI-LIQUOR OR .08% c90 §24(1)(a)(1)

Original Charge 90/24/J-6 OUI-LIQUOR OR .08% c90 §24(1)(a)(1) (Misdemeanor - more than 100 days incarceration)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

O'Leary, Richard D - Defendant

Charge # 3 : **90/24/E-2 - Misdemeanor - more than 100 days incarceration** NEGLIGENT OPERATION OF MOTOR VEHICLE c90 §24(2)(a)

Original Charge 90/24/E-2 NEGLIGENT OPERATION OF MOTOR VEHICLE c90 §24(2)(a) (Misdemeanor - more than 100 days incarceration)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

O'Leary, Richard D - Defendant

Charge # 4 : 90/23/C-2 - Misdemeanor - more than 100 days incarceration LICENSE REVOKED AS HTO, OPERATE MV WITH c90 §23

Original Charge 90/23/C-2 LICENSE REVOKED AS HTO, OPERATE MV WITH c90 §23 (Misdemeanor - more than 100 days incarceration)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

O'Leary, Richard D - Defendant

Charge # 5 : 90/23/D-2 - Misdemeanor - 100 days or less incarceration LICENSE SUSPENDED, OP MV WITH c90 §23

Original Charge 90/23/D-2 LICENSE SUSPENDED, OP MV WITH c90 §23 (Misdemeanor - 100 days or less incarceration)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

O'Leary, Richard D - Defendant

Charge # 6 : 89/4A-0 - Civil Motor Vehicle Infraction MARKED LANES VIOLATION * c89 §4A

Original Charge 89/4A-0 MARKED LANES VIOLATION * c89 §4A (Civil Motor Vehicle Infraction)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

O'Leary, Richard D - Defendant

Charge # 7 : 90/24/M-7 - Felony OUI-LIQUOR OR .08%, 4th OR GREATER OFFENSE c90 §24(1)(a)(1)

Original Charge 90/24/M-7 OUI-LIQUOR OR .08%, 4th OR GREATER OFFENSE c90 §24(1)(a)(1) (Felony)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

O'Leary, Richard D - Defendant

Charge # 8 : 90/23/F-1 - Misdemeanor - more than 100 days incarceration LICENSE SUSPENDED FOR OUI, OPER MV WITH c90 §23

Original Charge 90/23/F-1 LICENSE SUSPENDED FOR OUI, OPER MV WITH c90 §23 (Misdemeanor - more than 100 days incarceration)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

O'Leary, Richard D - Defendant

Charge # 9 : 90/23/E-2 - Misdemeanor - more than 100 days incarceration LICENSE SUSPENDED, OP MV WITH, SUBSQ. OFF. c90 §23

Original Charge 90/23/E-2 LICENSE SUSPENDED, OP MV WITH, SUBSQ. OFF. c90 §23 (Misdemeanor - more than 100 days incarceration)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/04/2015
Disposition Dismissed

Events

Date	Session	Location	Type	Event Judge	Result
10/16/2014 02:00 PM	Criminal 2		Arraignment		Not Held
10/16/2014 02:00 PM	Criminal 1		Arraignment		Held as Scheduled
11/05/2014 02:00 PM	Criminal 1		Pre-Trial Conference		Held as Scheduled
01/15/2015 02:00 PM	Criminal 1		Pre-Trial Hearing		Held as Scheduled
02/17/2015 09:00 AM	Criminal 1		Bail Hearing		Rescheduled
03/17/2015 09:00 AM	Criminal 1		Bail Hearing		Rescheduled
03/23/2015 09:00 AM	Criminal 1		Non-Evidentiary Hearing on Suppression		Not Held
04/14/2015 09:00 AM	Criminal 1		Bail Hearing		Held as Scheduled
05/11/2015 09:00 AM	Criminal 1		Non-Evidentiary Hearing on Suppression		Rescheduled
05/21/2015 02:00 PM	Criminal 1		Bail Hearing		Held as Scheduled
05/26/2015 09:00 AM	Criminal 1		Bail Hearing		Held as Scheduled
06/02/2015 02:00 PM	Criminal 1		Final Pre-Trial Conference		Rescheduled
06/16/2015 09:00 AM	Criminal 1		Jury Trial		Rescheduled
06/22/2015 09:00 AM	Criminal 1		Evidentiary Hearing on Suppression		Held as Scheduled
07/16/2015 02:00 PM	Criminal 1		Trial Assignment Conference		Not Held
07/21/2015 02:00 PM	Criminal 1		Trial Assignment Conference		Held as Scheduled
08/05/2015 02:00 PM	Criminal 2		Hearing		Rescheduled
			Hearing		Held as Scheduled

Date	Session	Location	Type	Event Judge	Result
08/06/2015 02:00 PM	Criminal 2				
09/22/2015 02:00 PM	Criminal 1	DED-2nd FL, CR Main (SC)	Motion Hearing	Fishman, Hon. Kenneth J	Rescheduled
09/22/2015 02:00 PM	Criminal 2	DED-2nd FL, CR 25 (SC)	Motion Hearing	Cosgrove, Hon. Robert C	Held as Scheduled
10/05/2015 09:00 AM	Criminal 1	DED-2nd FL, CR Main (SC)	Evidentiary Hearing to Dismiss	Connors, Hon. Thomas A	Held - Under advisement
10/13/2015 02:00 PM	Criminal 2	DED-2nd FL, CR 25 (SC)	Motion Hearing	Cannone, Hon. Beverly J	Held as Scheduled
10/21/2015 09:00 AM	Criminal 1	DED-2nd FL, CR Main (SC)	Conference to Review Status	Connors, Hon. Thomas A	Held as Scheduled
11/10/2015 02:00 PM	Criminal 1		Final Pre-Trial Conference		Held as Scheduled
11/17/2015 09:00 AM	Criminal 1		Jury Trial		Rescheduled
12/17/2015 02:00 PM	Criminal 1	DED-2nd FL, CR Main (SC)	Conference to Review Status	Connors, Hon. Thomas A	Rescheduled
01/04/2016 02:00 PM	Criminal 1		Conference to Review Status		Held as Scheduled
03/09/2016 02:00 PM	Criminal 1		Motion Hearing to Modify Probation Term/Conditions	Connors, Hon. Thomas A	Held as Scheduled
04/13/2016 02:00 PM	Criminal 1		Final Pre-Trial Conference		Canceled
04/20/2016 02:00 PM	Criminal 1		Jury Trial		Canceled
04/26/2016 02:00 PM	Criminal 1		Conference to Review Status		Held as Scheduled
05/18/2016 04:00 PM	Criminal 2		Motion Hearing	Brassard, Hon. Raymond J	Held as Scheduled
05/20/2016 09:00 AM	Criminal 1		Hearing for Warrant Removal	Connors, Hon. Thomas A	Held as Scheduled
09/21/2016 02:00 PM	Criminal 1		Trial Assignment Conference	Cannone, Hon. Beverly J	

Ticklers

Tickler	Start Date	Days Due	Due Date	Completed Date
Pre-Trial Hearing	10/16/2014	0	10/16/2014	12/04/2015
Final Pre-Trial Conference	10/16/2014	257	06/30/2015	12/04/2015
Case Disposition	10/16/2014	271	07/14/2015	12/04/2015
Under Advisement	10/05/2015	30	11/04/2015	
Status Review	10/05/2015	14	10/19/2015	

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/23/2014	Indictment returned	1	
09/24/2014	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 10/16/14	2	
10/16/2014	Deft arraigned before Court - Track B - Plea Not Guilty - Bail: No bail without prejudice - Atty. Fee: $150.00 (Paul Carlucci, Esq.) Continued to 11/5/14 for Bail and Pre Trial Conference. Habe DJJ - Pre Trial Hearing 1/15/15 Habe DJJ (Fishman, J) J McDermott a.c., JAVS		
10/16/2014	Assigned to Track "B" see scheduling order		
10/16/2014	Tracking deadlines Active since return date		
10/16/2014	RE Offense 1:Plea of not guilty		
10/16/2014	RE Offense 2:Plea of not guilty		
10/16/2014	RE Offense 3:Plea of not guilty		
10/16/2014	RE Offense 4:Plea of not guilty		
10/16/2014	RE Offense 5:Plea of not guilty		
10/16/2014	RE Offense 6:Plea of not guilty		
10/16/2014	RE Offense 7:Plea of not guilty		
10/16/2014	RE Offense 8:Plea of not guilty		
10/16/2014	RE Offense 9:Plea of not guilty		
10/16/2014	Tracking deadlines Active since return date		
10/16/2014	Appointment of Counsel Paul L Carlucci, pursuant to Rule 53		
10/27/2014	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 11/5/2014	3	
10/30/2014	10/16/14: Commonwealth files Statement of the Case	4	
10/30/2014	10/16/14: Commonwealth files Notice of Discovery I	5	
11/05/2014	After hearing, bail set at $5,000.00 cash - Bail Warnings - Pretrial Probation w/consent - GPS, not to operate MV - intoxometer - house arrest except for medical, legal appointments- 7pm - 6AM Curfew - Drug & alcohol free/w random testing. - Continued to 1/15/15 PTH - Habe DJJ (Fishman,J) J.McDermott a.c JAVS		
01/14/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 1/15/15	6	
01/15/2015	Case Tracking scheduling order (Thomas A. Connors, Regional Administrative Justice) Copies mailed to ADA & Attorney on 1/21/2015	7	
01/15/2015	Tracking Order filed - Continued 3/23/15 Motion to Suppress 6/2/15 Final Pre-Trial Conference 6/16/15 trial (3 days) - HABES DJ all dates. (Connors, J.) B. Roche, asst. clerk - JAVS		
01/21/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 3/23/15	8	
01/21/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 6/2/15	9	
01/21/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 6/16/15	10	
02/11/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 3/17/2015.	11	
02/12/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 2/17/15	12	
03/11/2015		13	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	MOTION by Deft: To Suppress Statements, Affidavit and Memorandum of Law In Support.		
03/18/2015	Commonwealth files Memorandum In Opposition to Deft's Motion to Dismiss and Certificate of Service.	14	
03/23/2015	Continued 5/11/15 M/S 9AM, agreed. Habe DJJ (Connors, J) J McDermott a.c., JAVS		
03/27/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 5/11/15.	15	
04/10/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 4/14/15 - per J. McDermott	16	
04/14/2015	Cash Bail Received $5,000.00 - Surety; Richard O'Leary - Receipt # 43173	17	
04/15/2015	Warrant to issue as requested by P.O. McClellan (Wilkins, J) B.G.Roche, a.c., N. Gagnon, ct. rot.		
04/16/2015	Warrant was entered onto the Warrant Management System 4/16/2015		
04/16/2015	MOTION by Commonwealth: to Revoke Defendant's Bail due to violation of conditions of release	18	
04/16/2015	Appointment of Counsel Katherine P Hatch, pursuant to Rule 53	19	
04/16/2015	Warrant recalled - Bail revoked. Continued 5/11/15 9am M/Suppress. Habe DJ (Wilkins, J) B.G.Roche, a.c., JAV'S		
04/16/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 5/11/14 @ 9am	20	
04/21/2015	Warrant canceled on the Warrant Management System 4/21/2015		
05/06/2015	Commonwealth's Motion For Production Of South Shore Hospital Records, Affidavit In Support Of Commonwealth's Motion For Production Of South Shore Hospital w/ORDER attached and Certificate of Service.	21	
05/06/2015	Commonwealth's Motion For Production Of South Shore Hospital Records, Affidavit In Support Of Commonwealth's Motion For Production Of South Shore Hospital Records w/ORDER attached and Certificate of Service.	22	
05/06/2015	Commonwealth's Motion For Production Of Fallon Ambulance Records, Affidavit In Support of Commonwealth's Motion For Production of South Shore Hospital Records, w/ORDER and Certificate of Service attached.	23	
05/06/2015	Commonwealth's Motion For Production Of Fallon Ambulance Records, Affidavit In Support Of Commonwealth's Motion For Production Of South Shore Hospital Records - w/ORDER & Certificate of Service attached.	24	
05/11/2015	Habeas corpus faxed to NHOC for 5/21/15 & 6/22/15	25	
05/21/2015	Bail & Conditions set on 11/5/14 reinstated; habe 5/26/15 - 9AM DJ for GPS - Motion to Suppress scheduled for 6/22/15 - 9AM (Wilkins, J) B G Roche ac JAVS		
05/22/2015	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 5/26/15	26	
06/22/2015	Continued 7/16/15 -Trial Assignment/Lobby -Defendant ALLOWED to seek employment - He must coordinate w/Probation including providing location & time (Wilkins, J.) J.McDermott, Asst. Clerk - JAVS		
06/22/2015	MOTION (P#13) After hearing, denied (Douglas Wilkins, Associate Justice). Copies mailed to ADA & Attorney on 6/24/15		
06/24/2015	Memorandum Of Decision And Order On Defendant's Motion To Suppress Statements - Motion to Suppress Evidence and Statements is DENIED (dated 6/22/15) (Wilkins, J.) Copies sent to ADA & Attorney on 6/24/15	27	
07/23/2015	MOTION (P#21.0) Allowed. No objection. See Order (Kenneth J. Fishman, Associate Justice). Copies mailed 7/23/2015 (7-21-15)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
07/23/2015	Order for Production of Records issued to South Shore Hospital re: Patricia Murphy by 8/28/2015 (Kenneth J. Fishman, Associate Justice) (7-21-15)	28	
07/23/2015	MOTION (P#22.0) Allowed. No objection. See Order. (Kenneth J. Fishman, Associate Justice). Copies mailed 7/23/2015 (7-21-15)		
07/23/2015	Order for Production of Records issued to South Shore Hospital re: Richard O'Leary by 8/28/2015. (Kenneth J. Fishman, Associate Justice) (7-21-15)	29	
07/23/2015	MOTION (P#23.0) Allowed. No objection. See Order. (Kenneth J. Fishman, Associate Justice). Copies mailed 7/23/2015 (7-21-15)		
07/23/2015	Order for Production of Records issued to Fallon Ambulance re: Patricia Murphy by 8/28/2015 (Kenneth J. Fishman, Associate Justice) (7-21-15)	30	
07/23/2015	MOTION (P#24.0) Allowed. No objection. See Order. (Kenneth J. Fishman, Associate Justice). Copies mailed 7/23/2015 (7-21-15)		
07/23/2015	Order for Production of Records issued to Fallon Ambulance re: Richard O'Leary by 8/28/2015 (Kenneth J. Fishman, Associate Justice) (7/21/15)	31	
07/23/2015	Continued 11/10/15 FPTC 11/17/15 Trial (3 days) Defendant to give Probation Department 24 hours notice of changed employment schedule. (Fishman, J) BG Roche a.c., JAVS		
07/31/2015	Hospital records from South Shore Hospital received		
08/05/2015	Commonwealth files: Motion to Revoke Defendant's Bail Due to Violation of Conditions of Release	32	
08/05/2015	Event Result: The following event: Hearing scheduled for 08/05/2015 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
08/07/2015	Comes into court - Continued to 11/10/15 by agreement for FPTC. - (Cosgrove,J) M. Thaler, ADA - D. Babcock, Atty - D. Chapin ct rpt M H Sanel ac (Dated 8/6/15)		
08/07/2015	Appearance of Deft's Atty: Douglas T. Babcock (Dated 8/6/15)	33	
08/07/2015	MOTION by Deft: For Assignment of Bail - ALLOWED - (Cosgrove,J.) (dated 8/6/15) Copies Mailed to ADA and Defense Counsel	34	
08/11/2015	MOTION (P#32) Denied after hearing. (Robert Cosgrove, Associate Justice). (Dated 8/5/15) Copies mailed to ADA and Defense Counsel		
08/15/2015	**Converted and manual data; Converted from MassCourt Lite, BasCot or ForeCourt (08/15/2015). Refer to case file for assessments, disbursements, and receipt validations.**		
08/15/2015	** On 04/14/2015 $5,000.00 was received for case NOCR2014-00788, funds received by the surety Richard O'Leary. The defendant in the case is Richard O'Leary. As of the date of conversion a remaining balance of $5,000.00 was converted for BAIL.		
09/17/2015	Commonwealth 's Motion to Revoke Defendant's Bail Due To Violation Of Conditions Of Release w/Quincy District Court Testing Program attachment	35	
09/22/2015	Event Result: The following event: Motion Hearing scheduled for 09/22/2015 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Transferred to another session		
09/22/2015	Event Result: The following event: Motion Hearing scheduled for 09/22/2015 02:00 PM has been resulted as follows:		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Result: Held as Scheduled. Defendant ordered held without bail. APPEARED: Commonwealth (Prosecutor); O'Leary, Richard D (Defendant); Babcock, Esq., Douglas Thomas (Attorney) on behalf of O'Leary, Richard D (Defendant); Thaler, Esq., Michael P. (Attorney) on behalf of Commonwealth (Prosecutor) Ct Rep: D Thaler Clerk: S Irwin		
09/22/2015	The defendant is committed without bail for the following reason: Per Order of the Court. Due To Violation of Terms of Release Next date: 10/05/2015 9:00 AM		
09/22/2015	Commonwealth 's Notice to Revoke Defendant's Bail Due to Violation of Conditions of Release	36	
09/23/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/05/2015 09:00 AM Evidentiary Hearing to Dismiss.		
09/23/2015	Endorsement on Motion to Revoke Defendant's Bail Due to Violation of Conditions of Release, (#36.0): ALLOWED After hearing, Allowed - Bail revoked- On Oct.5 hearing date Defendant may readdress the question of bail.		
10/05/2015	Matter taken under advisement The following event: Evidentiary Hearing to Dismiss scheduled for 10/05/2015 09:00 AM has been resulted as follows: Motion to Dismiss heard and under advisement - Counsel given to 10/13/15 to file additional memos. - Continued to 10/13/15 for Motion/Bail - Habe DJJ (Connors,J) J Mc Dermott a.c Javs Result: Held - Under advisement		
10/08/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/13/2015 02:00 PM Motion Hearing. Applies To: Babcock, Esq., Douglas Thomas (Attorney) on behalf of O'Leary, Richard D (Defendant); Thaler, Esq., Michael P. (Attorney) on behalf of Commonwealth (Prosecutor)		
10/13/2015	Event Result: The following event: Motion Hearing scheduled for 10/13/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled - Brought into court; $5,000.00 bail reinstated with conditions; 1.) GPS and intoxilizer - 2.) Probation to test Defendant at various/random times - 3.) Refrain from drugs & alcohol - 4.) Random testing - 5.) No alcohol in the home - 6.) House arrest except for medical & legal appointments - 7.) cannot work - Bail Warning read - Continued 11/10/15 by agreement for FPTC - M. Thaler, ADA - D. Babcock, Attorney - D. Keefer, Ct. Reporter - M.H. Sanel, Asst. Clerk		
10/16/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/10/2015 02:00 PM Final Pre-Trial Conference.		
10/19/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/21/2015 09:00 AM Conference to Review Status. Defendant to be brought into Court for GPS		
10/21/2015	Event Result: The following event: Conference to Review Status scheduled for 10/21/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled		
11/09/2015	Witness list Commonwealth's Prospective Applies To: Thaler, Esq., Michael P. (Attorney) on behalf of Commonwealth (Prosecutor)	37	
11/09/2015	Commonwealth 's Motion in limine to admit medical records and to preclude reference to and redact certain portion	38	
11/09/2015	Commonwealth's proposed juror Voir Dire questions filed.		
11/09/2015	Commonwealth 's Notice of expert testimony	39	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/09/2015	Commonwealth 's Motion in limine to allow in-court identification	40	
11/09/2015	Commonwealth 's Motion for Attorney-Conducted Individual Voir Dire Of Potential Jurors And Particular Topics	41	
11/10/2015	Event Result: The following event: Final Pre-Trial Conference scheduled for 11/10/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled - Continued 12/17/15 status - 4/13/16 FPTC - 4/20/16 Trial - R36 waived - B. Roche, Asst. Clerk		
11/12/2015	Event Result: The following event: Jury Trial scheduled for 11/17/2015 09:00 AM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
12/08/2015	Defendant 's Motion to Dismiss for Non-Compliance with M.G.L.c.90C - Motion allowed, w/attachments; See Decision (Cannone, J) M. Sanel, a.c. (12/7/15)	42	
12/08/2015	ORDER: Decision and Order on Defendant's Motion to Dismiss - Order - For the reasons discussed above, the defendant's Motion to Dismiss is ALLOWED. The indictment is dismissed. (Beverly J. Cannone, J) c/s ADA & Atty. (12/4/15)	43	
12/17/2015	Event Result: The following event: Conference to Review Status scheduled for 12/17/2015 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
01/04/2016	Event Result: The following event: Conference to Review Status scheduled for 01/04/2016 02:00 PM has been resulted as follows: After hearing, bail reduced to personal recog. with new condition of 5PM to 9AM curfew - Bail warning - All other conditions remain in effect. - Continued to 4/26/16 status. (Connors,J) B. G. Roche ac JAVS Result: Held as Scheduled		
01/04/2016	Event Result: The following event: Jury Trial scheduled for 04/20/2016 02:00 PM has been resulted as follows: Result: Canceled Reason: By Court prior to date		
01/05/2016	Defendant 's Motion to REduce Bail Due to Change of Circumstances - ALLOWED IN PART) Dated 1/4/16 - Copies mailed to ADA and Defense Counsel	44	
01/05/2016	Defendant 's Motion to Release Bail. - ALLOWED (Thomas Connors RAJ) Dated 1/4/16 Copies mailed to ADA and Defense Counsel	45	
01/13/2016	Commonwealth 's Response to Defendant's Notice of Appellate Costs	46	
01/27/2016	Offense Disposition: Charge #1 OUI-DRUGS & SERIOUS INJURY & NEGLIGENT c90 §24L(1) Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J Charge #2 OUI-LIQUOR OR .08% c90 §24(1)(a)(1) Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J Charge #3 NEGLIGENT OPERATION OF MOTOR VEHICLE c90 §24(2)(a) Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J Charge #4 LICENSE REVOKED AS HTO, OPERATE MV WITH c90 §23		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J Charge #5 LICENSE SUSPENDED, OP MV WITH c90 §23 Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J Charge #6 MARKED LANES VIOLATION * c89 §4A Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J Charge #7 OUI-LIQUOR OR .08%, 4th OR GREATER OFFENSE c90 §24(1)(a)(1) Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J Charge #8 LICENSE SUSPENDED FOR OUI, OPER MV WITH c90 §23 Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J Charge #9 LICENSE SUSPENDED, OP MV WITH, SUBSQ. OFF. c90 §23 Date: 12/04/2015 Method: Hearing Code: Dismissed Judge: Cannone, Hon. Beverly J		
02/01/2016	Notice of appeal filed by Commonwealth - allowing the defendant's Motion to Dismiss the Indictments (12/16/15) Applies To: Thaler, Esq., Michael P. (Attorney) on behalf of Commonwealth (Prosecutor)	47	
02/01/2016	Notice to Judge re: notice of appeal filed and to ADA Kukafka & Atty. Babcock Applies To: Thaler, Esq., Michael P. (Attorney) on behalf of Commonwealth (Prosecutor)		
02/01/2016	Court Reporter 10/5/15 Debra Keefer and 10/13/15 Debra Keefer is hereby notified to prepare one copy of the transcript of the evidence of 10/05/2015 09:00 AM Evidentiary Hearing to Dismiss, 10/13/2015 02:00 PM Motion Hearing	48	
03/07/2016	Commonwealth 's Motion to Revoke Defendant's Bail Due to Violation of conditions of Release	49	
03/09/2016	Comes into court. The following event: Motion Hearing to Modify Probation Term/Conditions scheduled for 03/09/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled. Motion denied. Applies To: O'Leary, Richard D (Defendant); Babcock, Esq., Douglas Thomas (Attorney) on behalf of O'Leary, Richard D (Defendant); Thaler, Esq., Michael P. (Attorney) on behalf of Commonwealth (Prosecutor); Event Judge: Connors, Hon. Thomas A - JAVS - Attest: Margaret H. Sanel, AC.		
03/09/2016	Endorsement on , (#49.0): DENIED After hearing - the motion is Denied (Connors, J)		
04/13/2016	Transcript received from Debra Keefer dated 10/5 & 13, 2015		
04/19/2016	Appeal: notice of assembly of record	52	
04/26/2016	Event Result: The following event: Conference to Review Status scheduled for 04/26/2016 02:00 PM has been resulted as follows:		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Result: Held as Scheduled: Terms of release to modified to allow Defendant to go to work and abide by a 9PM to 6AM curfew but Defendant must first show Probation proof of employment. Appeared: Prosecutor Commonwealth: ADA Connor standing in for ADA Thaler Defendant O'Leary, Richard D Attorney Babcock, Esq., Douglas Thomas JAVS Rm 1 Clerk: S Irwin		
05/02/2016	Notice of Entry of appeal received from the Appeals Court	53	
05/18/2016	Defendant not in court. Warrant to issue. The following event: Motion Hearing scheduled for 05/18/2016 04:00 PM has been resulted as follows: Result: Held as Scheduled Applies To: Event Judge: Brassard, Hon. Raymond J - RBois, PO - JAVS - Attest: Margaret H. Sanel, AC.		
05/19/2016	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 05/20/2016 09:00 AM Hearing for Warrant Removal.		
05/20/2016	Defendant 's Motion to Revoke Defendant's Bail Due to Violation of Conditions of Release & Certificate of Service	54	
05/20/2016	Event Result: The following event: Hearing for Warrant Removal scheduled for 05/20/2016 09:00 AM has been resulted as follows: Result: Held as Scheduled: Warrant Recalled. After hearing Defendant ordered released on conditions: 1) Must be under house arrest at McCormack Street address given to probation at all times with the exception to leave for Attorney and/or medical appointments with prior approval from probation department 2) must abide by a 5pm to 9am curfew 7 days weekly 3) Cannot go into any establishment, restaurant or private home where alcohol is kept and/or served to anyone 4) Must submit to random screens as requested by probation department 5) must have a GPS bracelet on at all times 6) Must have alcohol screening device/intoxilyzer on person at all times 7) failer to take a screen or violation of any term of release will be grounds for revokation of release. Appeared: Defendant O'Leary, Richard D Attorney Alford, Esq., Pamela Attorney Babcock, Esq., Douglas Thomas Ct Reporter: D Chapin Clerk: S Irwin		
05/20/2016	Recalled: Straight Warrant cancelled on 05/20/2016 for O'Leary, Richard D		

Case Disposition

Disposition	Date	Case Judge
Dismissed	12/04/2015	

NOCR14-0788-001

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

did operate a motor vehicle upon any way, or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, with a percentage by weight, of alcohol in her blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, and did so operate said motor vehicle negligently so that the lives or safety of the public might be endangered, and by any such operation so described caused serious bodily injury of another person, to wit: Patricia Murphy, in violation of M.G.L. c.90,s.24L (1),

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

..... { Foreman of the Grand Jury

..... { Assistant District Attorney
Norfolk District

NOCR14-0788-002

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

did operate a motor vehicle on a way, as defined in M.G.L. C.90, S.I, or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licensees, while under the influence of intoxicating liquor, in violation of M.G.L. c.90, §.24, (1)(a)(1)

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

..... { Foreman of the Grand Jury

..... { Assistant District Attorney
Norfolk District

NOCR14-0788-003

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

did operate a motor vehicle upon a way, as defined in G.L. C. 90, s.1, or in a place to which the public has right of access, or in a place to which members of the public have access as invitees or licensees, negligently, so that the lives or safety of the public might be endangered, in violation of G.L. c. 90, s. 24(2)(a),

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

Carole Shannon ..... { Foreman of the Grand Jury

..... { Assistant District Attorney
Norfolk District

NOCR14-0788-004

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

did operate a motor vehicle after his license or right to operate a motor vehicle, had been suspended or revoked by reason of his having been found to be a habitual traffic offender, as defined in M.G.L. c. 90, s. 22F, and after notice of such suspension or revocation of his right to operate a motor vehicle without a license had been issued by the registrar and received by said person or by his agent or employer, and prior to the restoration of such license or right to operate or to the issuance to him of a new license to operate, in violation of M.G.L. C.90, S. 23,

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

Carole Shannon ..... { Foreman of the Grand Jury

..... { Assistant District Attorney
Norfolk District

NOCR14-0788-005

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

did operate a motor vehicle after his license or right to operate a motor vehicle, had been suspended or revoked and after notice of such suspension or revocation of his right to operate a motor vehicle without a license had been issued by the registrar and received by said person or by his agent or employer, and prior to the restoration of such license or right to operate or to the issuance to him of a new license to operate, in violation of M.G.L. C.90, S. 23,

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

Carole Shannon
..... Foreman of the Grand Jury

..... Assistant District Attorney
Norfolk District

NOCR14-0788-006

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

being the driver of a motor vehicle on a way, said way divided into lanes, did fail to so drive that his vehicle was entirely within a single lane, did move from the lane in which he was driving before first ascertaining if such movement could be made with safety, in violation of MGL c.89, s.4A,

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

..... { Foreman of the Grand Jury

..... { Assistant District Attorney
Norfolk District

NOCR14-0788-007

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

did operate a motor vehicle on a way, as defined in M.G.L. C.90, S.l, or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licensees, while under the influence of intoxicating liquor, said defendant having been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the Commonwealth or any jurisdiction four or more times because of a like offense, as defined in M.G.L. c.90, s.1, prior to the commission of this offense, in violation of M.G.L. c.90, §.24, (1)(a)(1)

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

..... Foreman of the Grand Jury

..... Assistant District Attorney
Norfolk District

NOCR14-0788-008

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

did operate a motor vehicle, in violation of M.G.L. C.90, s.24, (1) (a), s.24G or s.24L, C.90B, s.8 (a), s.8A or s.8B, or C.265, s.13½, after his license, or right to operate without a license had been suspended or revoked pursuant to a violation of M.G.L. C.90, s.24, (1) (a), s.24G or s.24L, C.90B, s.8 (a), s.8A or s.8B, or C.265, s.13½, and after notice of such suspension or revocation had been issued and received by such person or by his agent or employer, and prior to the restoration of such license or right to operate without a license or the issuance to him of a new license to operate, in violation of M.G.L. c.90, §.23.

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

..... { Foreman of the Grand Jury

..... { Assistant District Attorney
Norfolk District

NOCR14-0788-009

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss At the SUPERIOR COURT, begun and holden at DEDHAM, within and for the County of Norfolk,

on the fourth Tuesday of September, 2014
THE JURORS for the Commonwealth of Massachusetts, on their oath present that

RICHARD O'LEARY

of Braintree in the County of Norfolk
on or about April 19, 2014
at Braintree in the County of Norfolk

did operate a motor vehicle after his license or right to operate a motor vehicle, had been suspended or revoked and after notice of such suspension or revocation of his right to operate a motor vehicle without a license had been issued by the registrar and received by said person or by his agent or employer, and prior to the restoration of such license or right to operate or to the issuance to him of a new license to operate, said defendant having been previously convicted of a like violation, in violation of M.G.L. C.90, S. 23,

against the peace of said Commonwealth, and contrary to the form of the Statute in such case made and provided.

A TRUE BILL

..... { Foreman of the Grand Jury

..... { Assistant District Attorney
Norfolk District

COMMONWEALTH OF MASSACHUSETTS

NORFOLK,s.s.

NORFOLK SUPERIOR COURT
CRIMINAL DOCKET 14-788

COMMONWEALTH

v.

RICHARD O'LEARY

DEFENDANT'S MOTION TO DIMISS

FOR NON-COMPLIANCE WITH M.G.L. c. 90C

Now comes Richard O'Leary, the Defendant in the above-referenced action, and, pursuant to G.L. c. 90C, § 2, moves to dismiss the instant complaint for failure to give the Defendant the citation at the time and place of the alleged violation, as required by G.L. c. 90C, § 2.

The Defendant files the attached memorandum of fact and law in support thereof with sworn to affidavits or percipient witnesses.

Respectfully submitted,
Richard O'Leary by his attorney,

Douglas T. Babcock, Esq.
BBO # 667992
60 State Street, 7th Floor
Boston. MA 02109

I. STATEMENT OF FACTS

1. On April 19, 2014, at or around 10:30 p.m., State Police Trooper Jared Gray responded to a motor vehicle accident on Route 3 in Braintree, on or at Exit 17 in the northbound direction.

2. When Trooper Gray arrived the defendant was already undergoing medical treatment along with another occupant of the vehicle, Patricia Murphy.

3. The Trooper questioned the defendant who indicated he was not the driver, and instead was the passenger in the vehicle.

4. The Trooper questioned Patricia Murphy who also indicated she was not the driver, and instead was the passenger in the vehicle.

5. During the Trooper's initial investigation and questions at the scene of the accident he indicated he could detect a strong odor of alcohol emanating from both Ms. Murphy and the Defendant.

6. Shortly after the Trooper's arrival the Defendant and Ms. Murphy were transported to South Shore Hospital in Weymouth.

7. Trooper Gray proceeded to South Shore hospital where he continued his investigation and questioning of both the Defendant and Ms. Murphy, without providing either with a Miranda warning.

8. Trooper Gray alleges that after continued questioning the Defendant changed his story and indicated he was the driver.

9. Trooper Gray then alleges that he advised defendant that "he would be receiving a criminal summons in the mail fort Operating Under the Influence, 5th offense, Operating After Revocation and Marked Lanes Violation." See Trooper Gray's report, last paragraph, attached hereto.

10. Both Ms. Murphy and the Defendant aver that Trooper Gray did NOT indicate charges would issue at this time. See the affidavit of Patricia Murphy, attached hereto.

11. There is no disagreement however that Trooper Gray did not place defendant under arrest; nor did he issue a citation to him at that time.

12. In fact the Defendant did not receive a copy of any citation in any form until he received a criminal summons in the mail, over six weeks later.

13. After over six weeks 1) the accident scene had been cleared of debris; 2) the Defendant and Ms. Murphy no longer had access to the vehicle and/or any forensic testing of the vehicle; 3) no longer had an opportunity to perform accident reconstruction or 4) any other investigation of the conditions as they existed at the time or even remotely around April 19, 2014, 10:30 p.m.

II. DISCUSSION

i. Statement of Relevant Law

General Laws c. 90C, § 2 provides as follows: "A failure to give a copy of the citation to the violator at the time and place of the violation ***shall constitute a defense in any court proceeding for such violation***, except where the violator could not have been stopped or where additional time was necessary to determine the nature of the violation or the identity of the violator, or where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and noncriminal method for disposing of automobile law violations, justifies the failure [emphasis added]."

The Supreme Judicial Court and Massachusetts Appellate Court have held time and again where there was no proper citation pursuant to c. 90C, § 2 dismissal is the appropriate remedy. See Commonwealth v. Cameron, 34 Mass.Ap.Ct. 44 1993.

ii. The Defendant Was Not Issued a Citation at the scene or even Remotely close in time to the incident

The purpose of G.L. c. 90, § 2, is twofold: (1) to protect against police officers "fixing" traffic tickets; and (2) to provide prompt and definite notice to violators of the alleged offenses against them. Commonwealth v. Babb, 389 Mass. 275, 283, 450 N.E.2d 155, 160, (1983); Commonwealth v. Pappas, 384 Mass. 428, 431, 425 N.E.2d 323, 326 (1981).

The courts have held that even 4 days is too long to wait to issue a citation. See Commonwealth v. Cameron, 34 Mass.Ap.Ct. 44 1993. In Cameron the court held once an officer has made the determination of who the operator was, there cannot be a delay, in that case even to determine if a young child who was hospitalized lived or died. The court stated plainly that c.90 requires prompt citation regardless of subsequent collateral events.

In the instant case while Trooper Gray does allege the Defendant would receive a summons in the mail, even if true that notice is completely insufficient. The very purpose of the statute is to require something more than just a police officer's claim of what was said. A corner stone of of American jurisprudence is that we as a people do not trust the government or its agents on a simple say so. Whether it be the need for search warrants, omission of hearsay or the requirement that a Defendant be able to confront testimonial evidence, the heart of our legal system is that we have a higher standard that just 'crediting an officer's testimony.' In the instant case the Massachusetts legislature has required that where there is a criminal offense arising from an incident with an automobile a *written* citation must be given at the time of the incident. Such a written citation was not given until weeks after the incident occurred and so the complaint in this case must be dismissed.

iii. The Defendant was Prejudiced by the Trooper's failure to comport with the law

The Defendant at bar did not receive prompt and timely notice of the charge against him as discussed above. A defendant need not show prejudice where a police officer has violated G.L. c. 90, § 2. Commonwealth v. Ryan, 22 Mass.App.Ct. 970, 971 , 495 N.E.2d 326, 328 (1986); Commonwealth v. Marchand, 18 Mass.App.Ct. 932, 933, 465 N.E.2d 1227, 1228 (1984). The Defendant here, however, did suffer prejudice. The debris at the collision scene, as well as the automobile involved, no longer can be examined by an accident reconstructionist to determine the cause of the crash. Furthermore any finger print evidence, DNA evidence or even the distance of the driver's seat to the wheel, all evidence

that could indicate who the driver was on the evening in question and all potentially exculpatory evidence, has been lost. Consequently, the Defendant's ability to present a full defense has therefore been frustrated by the police officer's negligence and significant prejudice has occurred. While not a requirement of the statute it is an aggravating factor that here heightens the justification for Dismissal.

iv. Seriousness of an accident alone is not sufficient notice that satisfies the statute

The Commonwealth is required to show that some circumstance, which does not contravene the legislative purpose of the statute, justified the delay in issuing a traffic citation to the defendant even where there is a serious accident. Cameron at 47.

While it is true that in some cases the court has held that a serious accident was a sort of implied notice, a extremely serious accident alone is insufficient evidence. In Commonwealth v. Babb, 389 Mass. at 275, the court held that "assuming the notice and abuse prevention purposes of § 2 are met, the apparent seriousness of the accident itself may justify a refusal to dismiss a complaint when an officer failed to issue a citation seasonably." In Babb the after fleeing the scene of an accident in an attempt to conceal her identity the Defendant transferred money in attempt to hide funds fearing a lawsuit and hired an attorney prior to the issuance of a citation, sufficient evidence the court found that the Defendant was aware of pending criminal charges.

In this case from the onset there was a legitimate question as to who was driving the vehicle. Officer Gray has stated that he continued his questioning at the hospital, obviously in an attempt to solidify this issue. The Defendant made numerous denials of his operation both at the scene and subsequently at the hospital. Trooper Gray has alleged he made an oral assertion of subsequent criminal charges against the Defendant. Such oral statements are insufficient as stated above, but even if the court credits the Trooper's statements 100% unlike Babb and similar cases the Defendant made no such subsequent actions evidencing he knew prosecution was likely. In fact the Defendant and Ms. Murphy both where unsure if any criminal charges would issue even weeks after the incident. (see affidavit of Ms. Murphy, attached hereto).

The Commonwealth has alleged serious bodily injury and that the Defendant was intoxicated. In the best light for the Commonwealth if those allegations are true then 1) the Defendant was intoxicated; 2) had suffered a head injury and 3) was in the process of being treated for that injury while being questioned by the Trooper. Given those circumstances it is not just possible but extremely likely that the Defendant would not remember what Trooper Gray had said and all the more reason while a *written* citation was necessary in this case.

III. CONCLUSION

As the Defendant was not issued a citation at the scene of the collision, for that reason alone the instant complaint must be dismissed. Furthermore, the Defendant was prejudiced by the failure of the Commonwealth and the specific facts in the instant case do not alleviate the Commonwealth's burden but rather heighten it. For the foregoing reasons, the Court should allow defendant's motion to dismiss with prejudice.

Affidavit of Patricia Murphy

1. My name is Patricia Murphy, I was with the Defendant on the night of April 14, 2014 at the scene of the accident.

2. I was also with the Defendant at the South Shore Hospital the night of April 14, 2014.

3. Throughout the course of that evening I was present at several times while Trooper Gray questioned Richard O'Leary.

4. At no point during that evening did I ever observe Trooper Gray inform Richard O'Leary that he would be charged with a crime.

5. In fact after Trooper Gray left the South Shore Hospital both Richard O'Leary and I had discussions and where under the belief that neither of us would be charged with a crime.

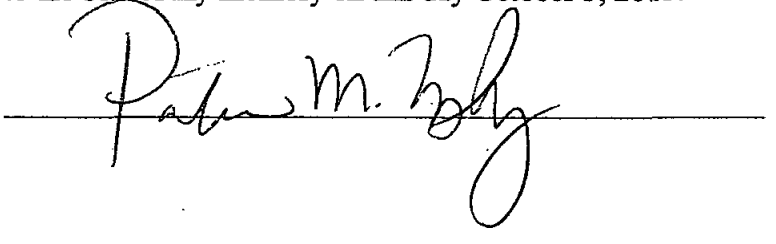
6. For several weeks after the incident both Mr. O'Leary and I looked for something in the mail or waited from some sort of contact from the State Police regarding what happened.

7. Approximately six weeks after the incident Mr. O'Leary received a summons in the mail indicating criminal charges and a motor vehicle citation.

8. During this period Mr. O'Leary lived with me, and I did not observe him receive any motor vehicle citation relating to this case, prior to receiving a summons.

9. Based upon my observations of Mr. O'Leary and our conversations, during this period Mr. O'Leary did not receive a motor vehicle citation relating to this incident and did not know if he would be charged with a crime.

I, Patricia Murphy, do state under the pains and penalties of perjury that the above statements are true and accurate to the best of my memory on this day October 5, 2015.



COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

NORFOLK SUPERIOR COURT
DOCKET NO. NOCR14-0788

COMMONWEALTH

v.

RICHARD O'LEARY

COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Now comes the Commonwealth and respectfully requests that this Honorable Court DENY Defendant's Motion to Dismiss.

FACTS

Now comes the Commonwealth in the above-captioned matter and respectfully indicates that the following is a brief narration of the allegations in the above-captioned matter as presented before the Norfolk County Grand Jury. The following is not intended to serve as a Bill of Particulars nor does it represent all of the facts known to the Commonwealth.

At approximately 10:30 p.m., on April 19, 2014, Trooper Jared Gray of the Massachusetts State Police was dispatched to a roll-over crash on Route 3 North in Braintree. Upon arrival, Trooper Gray observed a Jeep Grand Cherokee with heavy

damage. The Jeep had struck the off ramp sign to Exit 17 and rolled over multiple times. The sign was knocked to the ground several feet from its initial location.

There were two occupants of the Jeep, both of whom were receiving medical treatment by Braintree Fire and EMS. Patricia Murphy was identified as the passenger of the Jeep. She was boarded on a stretcher, covered in blood, and somewhat difficult to understand. She indicated that she was in the passenger seat and that she awoke with glass in her mouth. She further stated that she was at her birthday party in Abington and on her way home from Braintree. Richard O'Leary was the other occupant. He also was boarded on a stretcher and covered in blood. Trooper Gray detected a strong odor of an alcoholic beverage coming from his person and his speech was slurred. The defendant indicated that he was the passenger.

Both parties were transported to South Shore Hospital. At the hospital, Ms. Murphy reiterated that the defendant was driving. She required stitches in her right hand and shoulder. Ms. Murphy broke multiple ribs in the crash. The defendant still displayed signs of intoxication at the hospital. He stated that he had a couple beers and admitted to being the driver of the Jeep. Trooper Gray informed the defendant that he would be receiving a summons in the mail for OUI 5, operating after revocation, and marked lanes violation. The defendant was mailed the citation on April 28, 2014.[1]

ARGUMENT

The Defendant argues that the case should be dismissed for failure to give the defendant the citation at the time and place of alleged violation.

G. L. c. 90, Section 2 requires that a police officer,

[1] A copy of the citation is attached Exhibit 1.

> record the occurrence of automobile law violations upon a citation, filling out the citation and each copy thereof as soon as possible and as completely as possible...A failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except [1] where the violator could not have been stopped or [2] where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or [3] where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure. In such case the violation shall be recorded upon a citation as soon as possible after such violation and the citation shall be delivered to violator or mailed to him...

There are two purposes of the statute: 1) to prevent manipulation and misuse by eliminating unnecessary delay and 2) to give prompt and definite notice of the alleged offense to the violator. Commonwealth v. Kenney, 55 Mass.App.Ct. 514, 518 (2002), quoting Commonwealth v. Pappas, 384 Mass. 428, 431 (1981). "The statute...is designed to prevent a situation in which a person cannot establish a defense due to his being charged with a violation long after it occurs." Commonwealth v. Gorman, 356 Mass. 355, 357-358 (1969).

When there is a delay in issuing a citation, there is no per se rule of dismissal. Kenney, 55 Mass.App.Ct. at 519. Rather, "failure to comply with the statute is not fatal where the purposes of the statute have not been frustrated." Id., quoting Commonwealth v. Babb, 389 Mass. 275, 283 (1983). The Court considers a number of factors, including "whether the notice provisions of the statute have been met by other means, such as by an arrest; whether knowledge is an essential element of the motor vehicle crime charged and is required to be proved at trial; and whether the nature of the driving incident is so serious that the driver is deemed to be on notice." Id. As to the last factor, the Court held that "[i]t is inconceivable that the defendant would be unaware of the seriousness of

a situation in which his vehicle had crossed the center line of a public street and struck a pedestrian." Pappas, 384 Mass. at 431-432. "[T]he cases make clear that the very seriousness of particular charges tends to minimize the importance of absolute observance of the procedures because, again, 'fix' is virtually excluded, and notice is implicit." Babb, 389 Mass. at 283. "[W]here an apparent vehicular violation causes injury that is seen to be serious, the violator is implicitly on notice that he or she is at risk of being charged....[T]he nature of the injury serves in itself the general objective of the citation statute, described as 'early advice to the offender about the violation being charged and whether he or she is to expect a complaint beyond a mere warning.'" Kenney, 55 Mass.App.Ct. at 520-521, quoting Commonwealth v. Nadworny, 30 Mass.App.Ct. 912, 913 (1991), quoting Commonwealth v. Perry, 15 Mass.App.Ct. 281, 283 (1983).

Here, all three factors to satisfy the purpose of the statute in giving the defendant notice of the offense are present. First, notice was given by other means. Namely, the defendant was provided Miranda warnings and then informed that he would receive a citation in the mail for the charges, which included OUI 5 and operating with a revoked license. By its very nature, a person with at least four prior convictions for OUI who is provided Miranda warnings has enough familiarity with the legal system to know that he is being charged with a serious crime. Second, knowledge is an essential element of the crime of operating with a revoked license that is required to be proved at trial. Trooper Gray continued to investigate and charged the defendant on the citation with operating his motor vehicle after his license was suspended for prior OUI convictions. Knowledge is also required for that crime. Third, the nature of the crash was so serious that the

defendant is deemed to be on notice. The defendant flipped a SUV on a highway, causing damage to the vehicle and to the surroundings. Both he and the passenger were injured, covered in blood, and transported to a nearby hospital. The defendant's conduct clearly exhibit that he knew he was facing criminal charges as he lied on scene and at the hospital by claiming to be the passenger. The only purpose of the lie would be to avoid criminal charges. He knew that if he was identified as the driver, he would be charged.

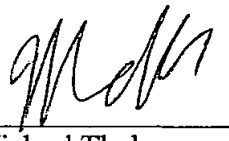
Here, the actual citation was only delayed a short period of time. In Kenney, a pedestrian was seriously injured by a vehicle on November 3, 1995 and by December 4, 1995 the police had sufficient evidence to issue the defendant a citation. Id., at 515-517. However, the defendant was never cited and the Commonwealth presented the case to the grand jury in April 1996 with indictments returning in June 1996. Id., at 517. As in Pappas, the Court found it to be "inconceivable that the defendant here was not aware of the prospect of potential criminal charges," thus the motion to dismiss the indictments was properly denied. Id., at 519, 521. It is equally inconceivable that the defendant was not aware, especially given the circumstances of the crash, his suspended license, his lies, and the fact that he was orally informed of the charges.

CONCLUSION

For the foregoing reasons and those reasons articulated by the Commonwealth during the hearing on Defendant's Motion to Dismiss, the Commonwealth respectfully requests this Honorable Court DENY Defendant's motion.

Respectfully Submitted,
For the Commonwealth

Michael W. Morrissey
District Attorney

By: 

Michael Thaler
Assistant District Attorney
45 Shawmut Road
Canton, MA 02021
(781) 830-4952

Dated: October 5, 2015

EXHIBIT 1

MASSACHUSETTS UNIFORM CITATION

R3893354

TYPE OF CITATION: ☑ OPERATOR ☐ OWNER ☐ PASSENGER ☐ BICYCLIST

DATE WRITTEN (M/D/YY): 4 28 14 | AGENCY CODE: 501 | OFFICER ID NUMBER: 3442 | COURT CODE: 86

VIOLATOR: MOTOR VEHICLE LICENSE NO. OR ID: [redacted] 31 74 | STATE: MA | CLASS: D | CDL LICENSE: ☐ YES ☐ NO | RACE: W | SEX: M | NON-INVENTORY MV SEARCH: ☐ YES ☐ NO | CODE

VIOLATOR NAME (Last): O'LEARY (First): RICHARD (Initial) | BIRTH DATE (M/D/YY): 5 4 63

ADDRESS: 79 ELM 2ND | CITY/TOWN: BRAINTREE | STATE: MA | ZIP: 02169

MV: PLATE TYPE: PAS | VEHICLE REGISTRATION NO.: 693 MD2 | STATE: MA | YEAR: 04 | MAKE AND TYPE: JEEP GC | COLOR: BLA | CDL VEHICLE: ☐ YES ☐ NO | 16+ PASSENGERS: ☐ YES ☐ NO | PLACARDED HAZMAT: ☐ YES ☐ NO

OFFENSE(S): OFFENSE DATE (M/D/YY): 4-19 | LOCATION OF OFFENSE (include #, st, hwy, city or town): 3N, BRAINTREE | TIME OF OFFENSE: 2230 ☐ AM ☐ PM | CRASH: ☐ YES ☐ NO

	CHAP/SEC/SUB		DESCRIPTION OF OFFENSE	ASSESSMENT
A.	89-4A	☑ CRIM ☐ CIVIL	MARKED LANES	$
B.		☐ CRIM ☐ CIVIL		$
C.		☐ CRIM ☐ CIVIL		$
D. SPEEDING ☐ 90/17 ☐ 90/18		CIVIL	MPH IN ___ A ___ MPH ZONE ☐ POSTED ☐ NOT POSTED ☐ UDAR ☐ CLOCKED ☐ RADAR ☐ ESTIMATED	$

TOTAL DUE: $

SPEEDING ASSESSMENTS INCLUDE A $50 HEAD INJURY SURCHARGE

OFFICER CHECK ONE ONLY: ☐ ALL CIVIL INFRACTIONS (See Instruction A on back) ☐ CRIMINAL APPLICATION (See Instruction B on back) ☐ ARREST ☐ WARNING (No action required)

OFFICER CERTIFIES ☐ IN HAND TO VIOL. ☐ MAILED TO VIOL. ☐ IN HAND TO VIOLATOR'S AGENT

AGENT NAME

X VIOLATOR/AGENT ACKNOWLEDGES RECEIPT OF CITATION

AGENT'S LICENSE NUMBER & STATE

NOTICE TO VIOLATOR
SEE REVERSE SIDE FOR INSTRUCTIONS

NOTICE TO OFFICER
ENTER ASSESSMENT $ AND TOTAL DUE $ ONLY IF YOU CHECK "ALL CIVIL INFRACTIONS". ENTER COURT ADDRESS BELOW ONLY IF YOU CHECK "CRIMINAL APPLICATION".

COURT ADDRESS

VIOLATOR COPY

MASSACHUSETTS UNIFORM CITATION

R3893353

TYPE OF CITATION: ☑ OPERATOR ☐ OWNER ☐ PASSENGER ☐ BICYCLIST

DATE WRITTEN (M/D/YY): 4 28 14 | AGENCY CODE: 501 | OFFICER ID NUMBER: 3442 | COURT CODE: 86

VIOLATOR: MOTOR VEHICLE LICENSE NO. OR ID: [redacted] 31 74 | STATE: MA | CLASS: D | CDL LICENSE: ☐ YES ☑ NO | RACE: W | SEX: M | NON-INVENTORY MV SEARCH: ☐ YES ☑ NO | CODE

VIOLATOR NAME (Last): O'LEARY (First): RICHARD (Initial) | BIRTH DATE (M/D/YY): 5 4 63

ADDRESS: 79 ELM 2ND | CITY/TOWN: BRAINTREE | STATE: MA | ZIP: 02169

MV: PLATE TYPE: PAS | VEHICLE REGISTRATION NO.: 693 MD2 | STATE: MA | YEAR: 04 | MAKE AND TYPE: JEEP GC | COLOR: BLA | CDL VEHICLE: ☐ YES ☑ NO | 16+ PASSENGERS: ☐ YES ☑ NO | PLACARDED HAZMAT: ☐ YES ☑ NO

OFFENSE(S): OFFENSE DATE (M/D/YY): 4-19 | LOCATION OF OFFENSE (include #, st, hwy, city or town): 3N, BRAINTREE | TIME OF OFFENSE: 2230 ☐ AM ☐ PM | CRASH: ☑ YES ☐ NO

	CHAP/SEC/SUB		DESCRIPTION OF OFFENSE	ASSESSMENT
A.	90-24-V	☑ CRIM ☐ CIVIL	OUT 5th	$
B.	90-23-E	☑ CRIM ☐ CIVIL	OP AFTER OUI	$
C.	90-23-C	☑ CRIM ☐ CIVIL	LICENSE REVOKED	$
D. SPEEDING ☐ 90/17 ☐ 90/18		CIVIL	MPH IN ___ A ___ MPH ZONE ☐ POSTED ☐ NOT POSTED ☐ UDAR ☐ CLOCKED ☐ RADAR ☐ ESTIMATED	$

TOTAL DUE: $

SPEEDING ASSESSMENTS INCLUDE A $50 HEAD INJURY SURCHARGE

OFFICER CHECK ONE ONLY: ☐ ALL CIVIL INFRACTIONS (See Instruction A on back) ☑ CRIMINAL APPLICATION (See Instruction B on back) ☐ ARREST ☐ WARNING (No action required)

OFFICER CERTIFIES ☐ IN HAND TO VIOL. ☐ MAILED TO VIOL. ☐ IN HAND TO VIOLATOR'S AGENT

AGENT NAME

X VIOLATOR/AGENT ACKNOWLEDGES RECEIPT OF CITATION

AGENT'S LICENSE NUMBER & STATE

NOTICE TO VIOLATOR
SEE REVERSE SIDE FOR INSTRUCTIONS

NOTICE TO OFFICER
ENTER ASSESSMENT $ AND TOTAL DUE $ ONLY IF YOU CHECK "ALL CIVIL INFRACTIONS". ENTER COURT ADDRESS BELOW ONLY IF YOU CHECK "CRIMINAL APPLICATION".

COURT ADDRESS

VIOLATOR COPY

[redacted]

Correct ADDress
179 Elm St #2
Braintree Mass 02184

COMMONWEALTH OF MASSACHUSETTS

NORFOLK,s.s.

NORFOLK SUPERIOR COURT
CRIMINAL DOCKET 14-788

COMMONWEALTH

v.

RICHARD O'LEARY

DEFENDANT'S RESPONSE

TO THE COMONWEALTH'S OPPOSITION

TO THE DEFENDANT'S MOTION TO DISMISS

Now comes Richard O'Leary, defendant in the above-referenced action, and states the following in response to the Commonwealth's Opposition to the Defendant's Motion to Dismiss.

The Following additional facts came to light in the hearing on said motion:

1. Trooper Grey did, without question, fail to issue a citation to the Defendant on the date of the offense.

2. The Trooper had his citation book with him, in his cruiser, but still did not issue the citation after he alleges the Defendant made an admission as to driving.

3. The Trooper sent the citation almost two weeks later and to the wrong address, relying on the booking sheet which had an incorrect zip code.

4. The Defendant did not receive notice of the citation until well over a month, in fact over 6 weeks after the incident.

5. The trooper did not make a record of the location of specific items or of specific details regarding the interior of the car, including exculpatory details such as the distance of the seat to the steering wheel, the location of personal items etc. not to mention making no investigation of fingerprints, DNA evidence or any subsequent investigation of any kind into the physical condition of the car after the accident.

6. There is no evidence that the Defendant took actions indicating that he knew that serious criminal charges would ensue, such as hiring an attorney or illicitly transferring funds etc. etc.

I. The Complaint at bar must be dismissed because there was no justification for failing to issue a written citation on the day of the incident.

In its response the Commonwealth relies heavily on Commonwealth v. Pappas, 384 Mass 428,

431 (1981). That much older case is immediately distinguishable from the case at bar in at least four essential ways, in Pappas there was: 1) a homicide. G.L. c. 90C, § 2, specifically makes an exemption for an incident where there is a death which is not applicable here; 2) in Pappas the Defendant left the scene and was not present and available at the scene to be cited, again unlike here; 3) in Pappas the Defendant was brought to the police station unlike in the case at bar; and 4) in Pappas the Defendant was cited the ***same day*** and at the police station where he was given a breathalyzer test.

In the case at bar there was no homicide, the Defendant did not leave the scene of the accident, the Defendant was not brought to the police station, was not given a breathlyzer test of any kind and did not receive a citation the same day. Given the extreme disparity between the reasoning in Pappas is not applicable to the case at bar.

The other case the Commonwealth relies upon is that of Commonwealth v. Kenney, 55 Mass.Ap.Ct. 514, 518 (2002). That case again is entirely and essentially different from the case at bar. In Kenney the Defendant: 1) fled the scene; 2) was unknown to police officers for over a month; 3) took affirmative steps to obtain legal representation two days after the incident and prior to the charges issuing; 4) took subsequent illicit actions, specifically removing $31,000.00 from a bank account because she was afraid she would be sued and wanted to hide the funds; 5) the victim suffered permanent injuries, losing the ability to walk and talk; 6) the Defendant was subsequently questioned by police a month after the incident as they continued to try and determine the identity of the driver who caused the accident.

Again the case at bar is entirely different from that of Kenney. Here the Defendant was present at the scene and was present with the police officer in the hospital after the accident giving the officer ample time to issue the citation, the Trooper formed the opinion the Defendant was the operator at the hospital while in the presence of the Defendant where he was able to cite him. No evidence has been offered by the Commonwealth that the Defendant took affirmative steps to protect him self or took subsequent illicit actions, no one suffered permanent life altering injuries and there was no subsequent investigation where the Defendant met with and was questioned by police after the date in question. Again, Given the extreme disparity between the facts the reasoning in Kenney is not applicable to the case at bar.

In short in Pappas the police could not have issued a citation at the time of the offense and in Kenney they did so the same day, and only because of those factors did the court looks to the other facts surrounding the case.

In the first instance the police could have issued a citation and didn't, and when they finally did it was weeks later. For that reason alone the complaint must be dismissed. Additionally, as discussed the facts in the case a vastly different from Kenney and Pappas and so even if the initial failure had some excuse, which there is none, the complaint still must be dismissed.

II. The Complaint at bar must be dismissed because a citation did not issue "as soon as possible as require by Statute and the Supreme Judicial Court of Massahusetts.

The case that Kenney refers to and bases its reasoning on, Commonwealth v. Carapellucci, 429 Mass. 579, (1999) is on point with the facts in the present case. The Supreme Judicial Court of Massachusetts took that case up on its own initiative, presumably because of potential ambiguity created by appellate court decisions concerning c. 90C s.2. The Supreme Judicial Court reversed the lower court ruling and Dismissed the complaint reasoning as follows:

> General Laws c. 90C, s. 2, pertaining to motor vehicle citations, provides that "failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation." Exceptions are provided where "the violator could not have been stopped or where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or where the court finds that a circumstance, not inconsistent with the purpose of this section . . . justifies the failure." Id. When such an exception applies, "the violation shall be recorded upon a citation as soon as possible after such violation and the citation shall be delivered to the violator or mailed to him . . . ." Id. ***Where the requirements of the statute are not followed, the complaint shall be dismissed regardless of whether the defendant was prejudiced by the failure.*** (emphasis added). See Commonwealth v. Mullins, 367 Mass. 33, 735 (1975); Commonwealth v. Perry, 15 Mass. App. Ct. 281 , 283 (1983).

In Carapellucci the Defendant led the Police on a high speed chase. There was a serious accident, as is in this case. Because the Defendant fled, he could not have been issued a citation. The Defendant did not receive notice of the charges until charges issued, as in this case. In Carapelucci no citation ever issued, but in the instant case the Defendant did not receive the citation until he received a criminal summons to court, effectively the same thing as no citation at all for the purposes of the Statute. The court stated in the plainest language possible that once law enforcement could have cited the Defendant they were obligated to do so, and failure to do so meant the ***complaint must be dismissed.*** Again quoting directly from the Supreme Judicial Court:

> In this case, it would have been impossible for the police to give the defendant a copy of the traffic citation at the time and place of the violation because he had fled the scene. Moreover, until the next day the police believed that another individual was the guilty party. Therefore, the exceptions for cases in which "the violator could not have been stopped" and in which "additional time was reasonably necessary to determine . . . the identity of the violator" applied.
>
> ***The complaint against the defendant must be dismissed***, however, because the police did not issue a citation and mail or deliver it to the defendant "as soon as possible after such violation." G. L. c. 90C, s. 2. (Emphasis added)

In the instant case as discussed above, in the prior motion, and at the initial hearing the Trooper admits that he was in the presence of the Defendant, determined the Defendant was the driver at the hospital shortly after the accident and did not issue a written citation to him at that time. The Trooper even admitted he had his citation book with him in his vehicle and did not get it, indicating he was at the end of his shift. The Trooper also admitted when he finally mailed the citation almost two weeks later it was to the wrong address and subsequent testimony revealed the Defendant did not receive any notice until 6 weeks after the incident.

Put succinctly in the instant case law enforcement does not even have the excuse that the Defendant fled, they could have issued a written citation and simply chose not to.

While the Appellate courts have made exceptions when it was impossible to provide a Defendant with a citation initially, and there is an accident causing death or permanent loss of speech and the ability to walk *and* additional aggravating factors exist the Supreme Judicial Court has made it clear the initial inquiry is always could the police have given a written citation at the time and if not did they do so as soon as possible. Here the initial inquiry reveals law enforcement could have issued a written citation at the hospital shortly after the accident and simply chose not to.

Where the court to decide that G.L. c. 90C, § 2 did not apply here, where the police officer had the opportunity to cite the defendant in writing and failed to do so, this court would be making new law. The court would also be directly contravening the plain language of a Statute enacted by the Massachusetts legislature that has been upheld to be good law time and again by the highest court in this State.

For the foregoing reasons the Defendant respectfully requests the court dismiss the Complaint against him in the above captioned matter.

Respectfully submitted,
Richard O'Leary by his attorney,

Douglas T. Babcock, Esq.
BBO # 667992
60 State Street, 7th Floor
Boston, MA 02109
617-571-5465

MASSACHUSETTS UNIFORM CITATION

R3893354

VIOLATOR COPY

DATE WRITTEN (MM/DD/YY)	4/28/14
AGENCY CODE	501
OFFICER ID NUMBER	3442
COURT CODE	56
TYPE OF CITATION	☑ OPERATOR ☐ OWNER ☐ PASSENGER ☐ BICYCLIST
VIOLATOR: MOTOR VEHICLE LICENSE NO. OR VIOLATOR	[redacted]71 74
STATE / CLASS / CDL LICENSE / RACE / SEX	MA / D / ☐ YES ☑ NO / W / M
NON-INVENTORY MV SEARCH	☐ YES ☑ NO
VIOLATOR NAME (Last)	O'LEARY
(First)	RICHARD
(Initial)	
BIRTH DATE (MM/DD/YY)	5/4/63
ADDRESS	49 ELM 2D
CITY/TOWN	BRAINTREE
STATE / ZIP	MA / 02169
MV: PLATE TYPE	PAS
VEHICLE REGISTRATION NO.	693 MA 2
STATE	MA
YEAR	04
MAKE AND TYPE	JEEP GC
COLOR	BLA
CDL VEHICLE	☐ YES ☑ NO
16+ PASSENGERS	☐ YES ☑ NO
PLACARDED HAZMAT	☐ YES ☑ NO
OFFENSE DATE (MM/DD/YY)	4-19
LOCATION OF OFFENSE (Include #, st, hwy, city or town)	3N, BRAINTREE
TIME OF OFFENSE	2230 ☐ AM ☐ PM
CRASH	☑ YES ☐ NO

OFFENSE(S)

	CHAP/SEC/SUB		DESCRIPTION OF OFFENSE	ASSESSMENT
A.	89-4A	☐ CRIM ☐ CIVIL	MARKED LANES	$
B.		☐ CRIM ☐ CIVIL		$
C.		☐ CRIM ☐ CIVIL		$
D. SPEEDING ☐ 90/17 ☐ 90/18		CIVIL	MPH IN ___ A ___ MPH ZONE ☐ POSTED ☐ NOT POSTED ☐ LIDAR ☐ CLOCKED ☐ RADAR ☐ ESTIMATED	$

TOTAL DUE $

SPEEDING ASSESSMENTS INCLUDE A $50 HEAD INJURY SURCHARGE

OFFICER CHECK ONE ONLY: ☐ ALL CIVIL INFRACTIONS (See Instruction A on back) ☐ CRIMINAL APPLICATION (See Instruction B on back) ☐ ARREST ☐ WARNING (No action required)

OFFICER CERTIFIES ☐ IN HAND TO VIOL. ☐ MAILED TO VIOL. ☐ IN HAND TO VIOLATOR'S AGENT

AGENT NAME

X VIOLATOR/AGENT ACKNOWLEDGES RECEIPT OF CITATION

AGENT'S LICENSE NUMBER & STATE

NOTICE TO VIOLATOR
SEE REVERSE SIDE FOR INSTRUCTIONS

NOTICE TO OFFICER
ENTER ASSESSMENT $ AND TOTAL DUE $ ONLY IF YOU CHECK "ALL CIVIL INFRACTIONS". ENTER COURT ADDRESS BELOW ONLY IF YOU CHECK "CRIMINAL APPLICATION".

COURT ADDRESS

MASSACHUSETTS UNIFORM CITATION

R3893353

VIOLATOR COPY

DATE WRITTEN (MM/DD/YY)	1/28/14
AGENCY CODE	501
OFFICER ID NUMBER	3442
COURT CODE	56
TYPE OF CITATION	☑ OPERATOR ☐ OWNER ☐ PASSENGER ☐ BICYCLIST
VIOLATOR: MOTOR VEHICLE LICENSE NO. OR VIOLATOR	[redacted]71 74
STATE / CLASS / CDL LICENSE / RACE / SEX	MA / D / ☐ YES ☑ NO / W / M
NON-INVENTORY MV SEARCH	☐ YES ☑ NO
VIOLATOR NAME (Last)	O'LEARY
(First)	RICHARD
(Initial)	
BIRTH DATE (MM/DD/YY)	5/4/63
ADDRESS	49 ELM 2D
CITY/TOWN	BRAINTREE
STATE / ZIP	MA / 02169
MV: PLATE TYPE	PAS
VEHICLE REGISTRATION NO.	693 MA 2
STATE	MA
YEAR	04
MAKE AND TYPE	JEEP GC
COLOR	BLA
CDL VEHICLE	☐ YES ☑ NO
16+ PASSENGERS	☐ YES ☑ NO
PLACARDED HAZMAT	☐ YES ☑ NO
OFFENSE DATE (MM/DD/YY)	4-19
LOCATION OF OFFENSE (Include #, st, hwy, city or town)	3N, BRAINTREE
TIME OF OFFENSE	2230 ☐ AM ☐ PM
CRASH	☑ YES ☐ NO

OFFENSE(S)

	CHAP/SEC/SUB		DESCRIPTION OF OFFENSE	ASSESSMENT
A.	90-24-V	☑ CRIM ☐ CIVIL	OUT 5th	$
B.	90-23-E	☑ CRIM ☐ CIVIL	OP AFTER OUI	$
C.	90-23-C	☑ CRIM ☐ CIVIL	LICENSE REVOKED	$
D. SPEEDING ☐ 90/17 ☐ 90/18		CIVIL	MPH IN ___ A ___ MPH ZONE ☐ POSTED ☐ NOT POSTED ☐ LIDAR ☐ CLOCKED ☐ RADAR ☐ ESTIMATED	$

TOTAL DUE $

SPEEDING ASSESSMENTS INCLUDE A $50 HEAD INJURY SURCHARGE

OFFICER CHECK ONE ONLY: ☐ ALL CIVIL INFRACTIONS (See Instruction A on back) ☐ CRIMINAL APPLICATION (See Instruction B on back) ☐ ARREST ☐ WARNING (No action required)

OFFICER CERTIFIES ☐ IN HAND TO VIOL. ☐ MAILED TO VIOL. ☐ IN HAND TO VIOLATOR'S AGENT

AGENT NAME

X VIOLATOR/AGENT ACKNOWLEDGES RECEIPT OF CITATION

AGENT'S LICENSE NUMBER & STATE

NOTICE TO VIOLATOR
SEE REVERSE SIDE FOR INSTRUCTIONS

NOTICE TO OFFICER
ENTER ASSESSMENT $ AND TOTAL DUE $ ONLY IF YOU CHECK "ALL CIVIL INFRACTIONS". ENTER COURT ADDRESS BELOW ONLY IF YOU CHECK "CRIMINAL APPLICATION".

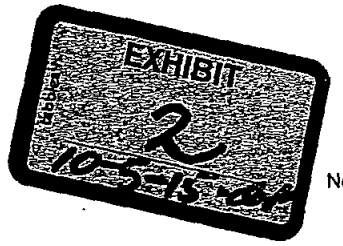
COURT ADDRESS

EXHIBIT 1 10/15/15 dlc

Correct ADDRESS
179 ELM ST #2
BRAINTREE MASS 02184

INCIDENT REPORT

State Police Norwell



P.O. Box 277
Norwell, MA 02061
(781) 659-7911

2014-0D1-001488

Activity

Traffic: Crash - MV PI
Start Date/Time: 04/19/2014 22:30:00

Location

RT 3 North & RAMP - UNION ST TO RT 3 NB, BRAINTREE; MA — Primary Location

Personnel

Primary Officer	Trooper	Jared	Gray	3442	D-1
Secondary Officer	Trooper	Kevin	Murray	2553	H-4
Secondary Officer	Trooper	William	McSweeney	3317	TK9
Secondary Officer	Trooper	Carol	Leurini	3629	D-1

Person

CSD1201401613

Last:	**OLEARY**	**First:**	**RICHARD**		**Involvement:**	**Veh Operator**	**Summons**
Middle:	D	D/O/B:	05/04/1963	50	Citizenship:		
Suffix:		Birthplace:			Marital Status:		
SSN:	[redacted]6865	Sex:	Male		Spouse:		
Lic#:	[redacted]3174	Race:	White		Father:		
Lic State:	MA	Height:			Mother:		
	REV	Weight:			Dependents:		
Address:	79 Elm St	Hair Color:			Occupation:		
City/Town:	Braintree	Eye Color:			Employer:		
State/Zip:	MA	Build:			Emp. Address:		
Phone#:		Complexion:			Emp. Phone:		

Charge(s):

89-4A MARKED LANES VIOLATION

90-23-F LICENSE SUSPENDED FOR OUI, OPER MV WITH

90-24-V OUI LIQUOR, 5TH OFFENSE

90-23-C LICENSE REVOKED AS HTO, OPERATE MV WITH

OSD1201401614

Last:	**MURPHY**	**First:**	**PATRICIA**		**Involvement:**	**Veh Owner**	**No Action**
Middle:	M	D/O/B:	04/28/1964	50	Citizenship:		
Suffix:		Birthplace:			Marital Status:		
SSN:	[redacted]6287	Sex:	Female		Spouse:		
Lic#:	[redacted]1022	Race:	White		Father:		
Lic State:	MA	Height:			Mother:		
	ACT	Weight:			Dependents:		
Address:	79 Elm St	Hair Color:			Occupation:		
City/Town:	Braintree	Eye Color:			Employer:		
State/Zip:	MA 02169	Build:			Emp. Address:		
Phone#:		Complexion:			Emp. Phone:		

Charge(s):

Trooper Jared Gray #3442 — Supervisor — ID#

04/28/2014 17:30:36

JVR 39 TRIAL 11.17.15

APPLICATION FOR CRIMINAL COMPLAINT	APPLICATION NO. (COURT USE ONLY) 1453AR-0975	Page 1 of 2	TRIAL COURT OF MASSACHUSETTS DISTRICT COURT DEPARTMENT Quincy DC One Dennis F. Ryan Parkway Quincy, MA 02169

I, the undersigned complainant, request that a criminal complaint issue against the accused charging the offense(s) listed below. If the accused HAS NOT BEEN ARRESTED and the charges involve:

☐ ONLY MISDEMEANOR(S); I request a hearing ☐ WITHOUT NOTICE because of imminent threat
☐ BODILY INJURY ☐ COMMISSION OF A ☐ FLIGHT ☐ WITH NOTICE to accused
☐ ONE OR MORE FELONIES, I request a ☐ WITHOUT ☐ WITH NOTICE to accused
☐ WARRANT is requested because prosecutor represents that accused may not appear unless

ARREST STATUS OF ACCUSED
☐ HAS ☒ HAS NOT been arrested

INFORMATION ABOUT ACCUSED

NAME (FIRST MI LAST) AND ADDRESS	BIRTH DATE	SOCIAL SECURITY NUMBER
RICHARD D OLEARY 79 Elm St Braintree MA	05/04/1963	[redacted]865
	PCF NO.	MARITAL STATUS null
	DRIVERS LICENSE NO. [redacted]174	LICENSE STATE MA
	GENDER / HEIGHT Male	WEIGHT / EYES
HAIR / RACE / COMPLEXION / SCARS/MARKS/TATTOOS White	BIRTH STATE OR COUNTRY	DAY PHONE
EMPLOYER/SCHOOL	MOTHER MAIDEN NAME	FATHER'S NAME

CASE INFORMATION

COMPLAINANT NAME (FIRST MI LAST)	COMPLAINANT TYPE	PD
Trooper Jared Gray ADDRESS State Police Norwell P.O. Box 277 Norwell, MA 02061	☒ POLICE ☐ CITIZEN ☐ OTHER	M.S.P.
	PLACE OF OFFENSE RT 3 North & RAMP - UNION ST TO RT 3 NB, BRAINTREE, MA	
	INCIDENT REPORT NO. 2014-0D1-001488	OBTN CSD1201401613
	CITATION NO(S)	

	OFFENSE CODE	CHARGE DESCRIPTION	CITATION #:	OFFENSE DATE
1	89-4A	MARKED LANES VIOLATION		04/19/2014
	VARIABLES (e.g. victim name, controlled substances, type and value of property, other variable information; see Complaint Language Manual)			
2	90-23-C	LICENSE REVOKED AS HTO, OPERATE MV WITH		04/19/2014
	VARIABLES (e.g. victim name, controlled substances, type and value of property, other variable information; see Complaint Language Manual)			
3	90-23-F	LICENSE SUSPENDED FOR OUI, OPER MV WITH		04/19/2014
	VARIABLES (e.g. victim name, controlled substances, type and value of property, other variable information; see Complaint Language Manual)			

REMARKS	COMPLAINANT'S SIGNATURE	DATE FILED
	[signature]	04.28.14

COURT USE ONLY — A HEARING UPON THIS COMPLAINT APPLICATION WILL BE HELD AT THE ABOVE COURT ADDRESS ON — DATE OF HEARING — AT TIME OF HEARING

DATE	PROCESSING OF NON-ARREST APPLICATION (COURT USE ONLY)	CLERK/JUDGE
	NOTICE SENT OF CLERK'S HEARING SCHEDULED ON:	
	NOTICE SENT OF JUDGE'S HEARING SCHEDULED ON:	
	HEARING CONTINUED TO: 6/16/14	
	APPLICATION DECIDED WITHOUT NOTICE TO ACCUSED BECAUSE: ☐ IMMINENT THREAT ☐ BODILY INJURY ☐ CRIME ☒ FLIGHT BY ACCUSED ☐ FELONY CHARGED AND POLICE DO NOT REQUEST NOTICE ☐ FELONY CHARGED BY CIVILIAN; NO NOTICE AT CLERK'S DISCRETION	

DATE	COMPLAINT TO ISSUE	COMPLAINT DENIED	CLERK/JUDGE
6/16/14 4-30-14	☒ PROBABLE CAUSE FOUND FOR ABOVE OFFENSE(S) NO(S) ☒ 1 ☒ 2 ☐ 3 BASED ON ☒ FACTS SET FORTH IN ATTACHED STATEMENT(S) ☒ TESTIMONY RECORDED; TAPE NO: [illegible] START NO: [illegible] END NO: [illegible] ☐ WARRANT ☒ SUMMONS TO ISSUE ARRAIGNMENT DATE:	☐ NO PROBABLE CAUSE FOUND ☐ REQUEST OF COMPLAINANT ☐ FAILURE TO PROSECUTE ☐ AGREEMENT OF BOTH PARTIES ☐ OTHER COMMENT Late hearing Allowed	[signature]

COURT COPY

EXHIBIT 3

(43)

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 14-0788

COMMONWEALTH

vs.

RICHARD O'LEARY

DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

The defendant has moved pursuant to M.G.L. c. 90C, to dismiss the indictment because police failed to give him a citation at the time and place of the violation as required by statute. The Commonwealth argues that the purpose of the statute was met therefore the case must not be dismissed.

BACKGROUND

G. L. c. 90C §2 requires that a police officer record the occurrence of automobile law violations upon a citation, filling out the citation and each copy thereof as soon as possible and as completely as possible.... A failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except [1] where the violator could not have been stopped or [2] where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or [3] where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations,

justifies the failure. In such case the violation shall be recorded upon a citation as soon as possible after such violation and the citation shall be delivered to violator or mailed to him....

FACTS

On April 19, 2014 at approximately 10:30 PM, Trooper Jared Gray (Gray) of the Massachusetts state police reported to the scene of a car rollover on Route 3N at exit 17 in Braintree. When he arrived, he observed a busy accident scene with police and emergency vehicles present. He noticed a Jeep Cherokee that had rolled over and was on its side, perpendicular to the road. It appeared that the exit sign was dislodged as a result of the accident and the off ramp was closed. When he approached the vehicle he came upon the defendant and the passenger, Patricia Murphy. Ms. Murphy was located near the passenger door of the car and was covered in blood and glass. The defendant was being tended to by emergency personnel and was also covered in blood and glass. The trooper noted that both occupants appeared to be seriously injured. When he initially spoke with Ms. Murphy she told him that she was a passenger in the vehicle. When he originally spoke with the defendant, the defendant also said that he was a passenger in the vehicle. Both occupants were placed on stretchers and taken by ambulance to South Shore Hospital. The trooper followed. At the time Gray spoke with the occupants on the roadside, he did not have his citation book on him and did not know the extent of their injuries. When he arrived at the emergency room he left his citation book in his vehicle and went to speak individually to each occupant.

Upon speaking with Ms. Murphy he noted that she appeared to be intoxicated, that her speech was slurred, but that she seemed to understand their conversation. She told the trooper

that she was a passenger in the vehicle. The trooper then went and spoke with the defendant. He made observations of an odor of alcohol coming from the defendant, that the defendant's eyes were glassy and that his speech was slurred. The defendant said that he was the driver of the vehicle after saying that he was a passenger. He also told the trooper that he had had "a couple of beers." Gray read O'Leary his Miranda rights and O'Leary repeated that he was the driver of the car. The trooper told O'Leary that he would get a summons in the mail. It was the trooper's intent to complete his investigation, file his report with his supervisor and then send the citation. After filing his report with the supervisor, Gray waited nine days for the report to be approved. Once it was approved on April 28, 2014, the citation was sent to the address that was on file with the state police. The address was a Braintree residence however the ZIP Code was a Quincy ZIP Code. The citation was mailed and not received by the defendant until five or six weeks later.

After the accident, the defendant did not hire an attorney or take steps to defend the criminal case. Ms. Murphy testified credibly at the hearing that she thought that this was merely a car accident and that there would be no charges arising from it. Ms. Murphy testified that at the time of the accident, the Jeep flipped over five times and she feared she would die. At one point she lost consciousness and appeared to be in shock. She broke several ribs and was put in the trauma unit at the hospital. For several weeks after the incident both Mr. O'Leary and Ms. Murphy looked for something in the mail or waited for some sort of contact from the state police regarding what had happened. At the time of the accident, O'Leary was on probation for operating under the influence of alcohol; subsequent offense. His license was suspended and he was not legally permitted to drive.

ANALYSIS

G.L. c. 90C, § 2, provides in pertinent part that:

> "[A]ny police officer assigned to traffic enforcement duty shall, whether or not the offense occurs within his presence, record the occurrence of automobile law violations upon a citation, filling out the citation and each copy thereof as soon as possible and as completely as possible and indicating thereon for each such violation whether the citation shall constitute a written warning and, if not, whether the violation is a criminal offense for which an application for a complaint ... shall be made .... A failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except where the violator could not have been stopped or where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure."

The statute requires that police issue citations to violators at the time and place of the subject infraction. Failure to do so constitutes a defense in any court proceeding for such a violation. However, certain statutory safety valves also exist, and it is plain that citations can be issued later when "additional time [is] reasonably necessary to determine the nature of the violation' or for other extenuating circumstances." Commonwealth v. Gammon, 22 Mass. App. Ct.1, 4 (1986), quoting from Commonwealth v. Marchand, 18 Mass. App. Ct. 932, 933 (1984). "When a copy of the citation is not given to the alleged violator at the scene of the offense, the burden shifts to the Commonwealth to demonstrate that one of the exceptions to this requirement set forth in the statute is applicable." Commonwealth v. Correia, 83 Mass. App. Ct. 780, 783 (2013). The defendant need not demonstrate prejudice.[1] See Commonwealth v. Mullins, 367 Mass. 733, 734-735 (1975).

By its terms, the statute excuses the need to deliver a copy of the citation at the time and place of the violation in three circumstances: (1) when "the violator could not have been stopped"; (2) when "additional time was reasonably necessary to determine the nature of the violation or the identity of the violator"; and (3) "where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure." The defendant was present at the scene of the accident and Gray completed his investigation into the nature of the violation and the identity of the violator by the time he left South Shore Hospital. There was no indication at the evidentiary hearing that further investigation was done and it does not appear that additional time was necessary to determine the nature of the violation or the identity of the violator.

The Commonwealth argues that the third exception to the requirements set forth in the statute is applicable to this case. Here, the Commonwealth argues that the notice provisions of the statute have been met by other means; specifically that the defendant, who was on probation for OUI 4 and operating with a revoked license for OUI, knew, based on his prior criminal cases and the fact that Gray read him Miranda warnings, that his conduct would result in criminal charges and that the seriousness of the crash put the defendant on notice that he would be facing criminal charges. Trooper Gray testified credibly that the defendant and passenger appeared to be intoxicated and seriously injured. This court credits his testimony that he informed the defendant that he would receive a summons. However, at the time the trooper told the defendant this information, the defendant was boarded and immobilized while he received treatment for his

[1] The defendant has argued specific prejudice; the court declines to address this issue.

injuries at the hospital. This court is not satisfied that the defendant was put on notice through the statement of Trooper Gray that the defendant would receive a summons. Additionally, though the defendant undoubtedly at some point during the night of the accident knew he was not legally permitted to drive, there was testimony that he drove because Ms. Kelly was intoxicated and testimony that he denied driving before admitting that he was the driver. The Commonwealth argues that in changing his story, the defendant clearly was aware that he would be charged with driving while his license was suspended for OUI. The defendant argues that the fact that he changed his mind could be because his memory was troubled or because of the stress of the accident, which would heighten the need for the citation to be presented as soon as possible and as completely as possible. The Commonwealth also asserts that the serious nature of the crash put the defendant on notice that he would be charged.

In support of its position, the Commonwealth relies upon Commonwealth v. Pappas, 384 Mass. 428 (1981) and Commonwealth v. Kenney, 55 Mass.App.Ct. 514, 515–521 (2002). Pappas is distinguished from this case in several respects. In Pappas, the delay in issuing a citation to the driver involved in a fatal accident was "reasonably necessary" where the delay was caused almost entirely by the need to clear the scene, investigate the cause of the fatal accident and determine the nature of the violations. Pappas left the scene of the accident; the condition of the victim was unknown at the time of the initial investigation and the defendant was ultimately brought to the police station and cited the same day as the accident, not weeks later. In Kenney, supra at 515–516, the defendant hit a pedestrian with her car and fled the scene; the victim was thrown forty-three feet upon impact and suffered debilitating and permanent injuries. The Appeals Court observed that, in such circumstances, the defendant could not have failed to grasp the gravity of the situation from the moment of impact, and was implicitly on notice that criminal charges were likely forthcoming. Id. at 519. Indeed, immediately after the accident the defendant hired a defense attorney and withdrew $31,000 from her bank account. Id. at 520. Having satisfied one of the two major purposes of G.L. c. 90C, § 2 (notice to defendant of potential charges), the Commonwealth's failure to issue a citation before putting the case to a grand jury some months later was excused. Id. at 519–521. Nothing comparable exists here. The underlying accident involved serious injury only to the defendant and his passenger. The defendant and Ms. Murphy could reasonably have believed that what occurred was an accident. Though for several weeks after the incident both Mr. O'Leary and Ms. Murphy looked for something in the mail or waited from some sort of contact from the State Police regarding what happened, nothing particularly pertinent can be determined from the defendant's post-accident behavior that would support the Commonwealth's argument.

The Commonwealth has not met its burden here. Compare Correia, supra (off duty police officer told violator he would issue citation, explained that he did not have his citation book with him, and delivered citation to defendant at the end of his first shift back at work).

Gray did not hand the defendant a citation at the scene or at the hospital. After writing his report, the report was passed onto his supervisor who needed to approve it. Inexplicably, that process took nine days. It was after the approval and after a review of the defendant's criminal and driving histories that the citation was written. Due to an error in the zip code, it took another month before the defendant received the summons.

Though fully cognizant of the fact that the charges here are very serious, governing caselaw compels the court to dismiss the indictments.

ORDER

For the reasons discussed above, the defendant's Motion to Dismiss is **ALLOWED.**

The indictment is dismissed.

Beverly J. Cannone
Justice of the Superior Court

DATE: December 4, 2015

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK COUNTY

NORFOLK SUPERIOR COURT
Docket No. NOCR2014-0788

COMMONWEALTH

v.

RICHARD O'LEARY

COMMONWEALTH'S NOTICE OF APPEAL

The Commonwealth announces its intention to appeal, pursuant to Mass. R. Crim. P. 15(a)(1) and G.L. c. 278, § 28E, the December 4, 2015 Order of this Court (Beverly J. Cannone, J.) allowing the defendants' motion to dismiss the indictments.

Respectfully submitted,
for the Commonwealth,

Michael Glenn

Assistant District Attorney
BBO # 680784
45 Shawmut Road
Canton, MA 02021
(781) 830-4800

Date: 12/16/15

CERTIFICATE OF SERVICE

I certify that the above has been served on the defendant by first class mail to his counsel of record, Douglas T. Babcock, Esq., 60 State Street, 7th Floor, Boston, MA this 16th day of December 2015 ~~2012~~.

Assistant District Attorney